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No. 93-____

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**In The**
**SUREME COURT OF THE UNITED STATES**
**October Term, 1993**

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CIRCUIT COURT OF THE FIRST CIRCUIT,
through the Honorable Marie M. Milks,
Criminal Administration Judge
and
Robert A. Marks, Attorney General of Hawaii,
*Petitioners*,

vs.

DWIGHT O. DOW,
*Respondent.*

---

**Petition For A Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

---

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred in ruling that a person convicted of drunk driving and sentenced to a fine, a driver's license suspension, and a fourteen (14) hour alcohol rehabilitation class, suffered a severe restraint upon his liberty because of his required class attendance, so as to satisfy the "in custody" requirement of 28 U.S.C. § 2254(a) entitling him to invoke federal habeas corpus jurisdiction?

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**Petition For A Writ Of Certiorari**
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**For The Ninth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

---

Petitioners, CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Marie Milks, Criminal Administrative Judge, and Robert A. Marks, Attorney General of Hawaii, (hereinafter "Petitioners") respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the

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*At the time the petition for writ of habeas corpus was filed below the criminal administrative judge was Wendell K. Huddy and the Attorney General of Hawaii was Warren Price, III, both of whom were subsequently substituted as indicated above.

Ninth Circuit (hereinafter "Ninth Circuit") filed on June 10, 1993 (hereinafter "Opinion") and the Ninth Circuit's Order of August 4, 1993 denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. *See* Appendix ("App.") "A", attached, at 1a; *see also* App. B, attached, at 6a.

## OPINIONS BELOW

The Opinion of the Ninth Circuit in *Dwight O. Dow v. Circuit Court of the First Circuit* has been published and is reported at 995 F.2d 922 (9th Cir. 1993).

## JURISDICTION

The Opinion of the Ninth Circuit was entered on June 10, 1993, and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on June 23, 1993. *See* App. "A", attached, at 1a; App. "C", attached, at 8a; and App. "D", attached at 24a, respectively. The Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the Ninth Circuit in its Order of August 4, 1993. *See* App. "B", attached, at 6a. The time in which this Petition may be filed extends to and includes November 2, 1993, and this Petition is timely.

Jurisdiction in this Court is invoked under 28 U.S.C. § 1254 (1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1), provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to

> any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 2254(a), provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

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## STATEMENT OF THE CASE

Respondent, DWIGHT O. DOW (hereinafter "Respondent"), was convicted of Driving Under the Influence of Intoxicating Liquor, in violation of Section 291-4, Hawaii Revised Statutes. *Dow v. Circuit Court of the First Circuit*, 779 F.Supp. 139 (D. Hawaii 1991). As the result of this conviction, the trial court sentenced Respondent to a $250 fine, a ninety-day driver's license suspension, and a fourteen-hour alcohol rehabilitation class. *Id.* Respondent's conviction was subsequently affirmed by the Hawaii Supreme Court. *Id.* at 140; *see also* App. "F", attached at 44a.

After exhausting state remedies, Respondent filed an application for writ of habeas corpus in the United States District Court for the District of Hawaii (hereinafter "USDC"). He claimed the State obtained his conviction in violation of the Double Jeopardy Clause. 779 F.Supp. at 140; *see also* App. "I", attached at 97a. Respondent argued that the USDC had jurisdiction to entertain his application because his sentence to the

alcohol rehabilitation class amounted to his being "in custody" within the meaning of 28 U.S.C. § 2254(a) (hereinafter "§ 2254(a)"). *Id.*

In support of his petition, Respondent attached the Declaration of Driver Education Administrator Pauline N. Namuo (hereinafter "Declaration"), which provided that Respondent could elect to attend either a three-day program where classes were held four hours a day, or a five-day program where classes were held two and one-half hours a day. *Id.*; *see also* App. "I", attached, Declaration at 112a. The Declaration also provided that if Respondent failed to attend one of the programs, his noncompliance would be reported to the trial court, and "a bench warrant [would] issue on the ground that [he was] is in contempt." *Id.*

In its answer to Respondent's petition, Petitioners argued that Respondent's mandatory participation in the alcohol rehabilitation class did not constitute a severe restraint upon his liberty. Thus he was not "in custody" within the meaning of § 2254(a), and the USDC had no jurisdiction to entertain the petition. *See* App. "G", attached at 58a. The USDC agreed, and said:

> The court finds that the mandatory class attendance for a few hours each day over a period of three or five days, is insufficient to constitute the kind of "'severe restraint[ ] on individual liberty' for which habeas corpus relief is reserved." *Harts v. State of Indiana*, 732 F.2d at 97 (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 353, 93 S.Ct. 1571, 1576, 36 L.Ed.2d 294 (1973)).

779 F. Supp. at 141. In reaching the conclusion that Respondent "was not 'in custody' within the meaning of

section 2254," the USDC also considered the "fair amount of control [Respondent had] over the scheduling of the classes." *Id.* The USDC ruled it lacked jurisdiction to hear Respondent's claim. *Id.*

Respondent appealed from the denial of his petition and the Ninth Circuit reversed the USDC's decision. *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922 (9th Cir. 1993); *see* App. "A", attached at 1a. In citing to *Jones v. Cunningham*, 371 U.S. 236 (1963), the Ninth Circuit stated that, "to satisfy the custody requirement, [Respondent] must demonstrate that he is subject to a significant restraint upon his liberty 'not shared by the public generally.'" *Dow*, 995 F.2d at 923. The Ninth Circuit then concluded:

> The sentence in this case, requiring appellant's physical presence at a particular place, significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for jurisdictional purposes, as "custody." Appellant "cannot come and go as he pleases." *Hensley*, 411 U.S. at 351, 93 S.Ct. at 1575. Moreover, appellant suffers a greater restraint upon his liberty — mandatory class attendance — than the restraint suffered by a person who is released upon his own recognizance. *See id.* at 351-53, 93 S.Ct. at 1574-76[.]

995 F.2d at 923.

The Ninth Circuit's failure to apply the Hensley standard resulted in the absurd conclusion that Respondent's mandatory fourteen-hour alcohol rehabilitation class amounted to a severe restraint on his liberty,

and exceeded the severity of restraint imposed upon Hensley. Accordingly, Petitioners file this Petition.

## REASONS FOR GRANTING THE WRIT

The Ninth Circuit concluded that the state trial court's order requiring Respondent to attend fourteen (14) hours of alcohol abuse counseling classes constituted the jurisdictional requisite of being "in custody" within the meaning of § 2254(a), and constituted a greater restraint on Respondent's liberty than the kind of restraint imposed in *Hensley*. Although properly recognizing this Court's standard that a person must be under "severe restraint" to be "in custody" before habeas jurisdiction is established under § 2254(a), the Ninth Circuit nonetheless concluded that Respondent was "in custody," solely because he was required to attend a fourteen-hour alcohol rehabilitation class. But in so doing, the Ninth Circuit ignored *Hensley*. Further, the Ninth Circuit's decision contradicts the decisions of other circuit courts which consistently apply this Court's "severe restraint" standard in determining the "in custody" jurisdictional requirement of § 2254(a).

### I. This Court Should Grant Review To Correct The Ninth Circuit's Decision Which Failed To Apply This Court's "Severe Restraint" Standard To Determine The "In Custody" Jurisdictional Requirement Under Section 2254(a).

While this Court does not restrict the use of federal habeas corpus to situations in which a petitioner is in actual physical custody, (*Jones v. Cunningham*, 371 U.S. 236 (1963)), this Court has held that in order to satisfy the "in custody" jurisdictional requirement of §

2254(a), a person must be subject to "severe restraints" on his liberty not shared by the general public. *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). However, in this case, the Ninth Circuit failed to apply that controlling standard.

In *Jones*, the issue was whether a state prisoner, placed on parole and under the "custody and control" of the Parole Board, was "in custody" such that he could invoke federal habeas corpus review of his state sentence. 371 U.S. at 236-38. The Court found the following facts to be determinative in reaching the conclusion that the conditions under which Petitioner Jones was placed amounted to a "significant restraint" upon his liberty:

> [Jones] is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. [Jones] must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole, and

> he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime.

371 U.S. at 242 (footnotes omitted). The Court reasoned that, where restrictions and conditions "significantly restrain [a person's] liberty to do those things which in this country free men are entitled to do[,]" a person was "in custody." 371 U.S. at 243. The Court concluded that while Jones' parole status freed him from actual physical custody, the practical result of his parole status resulted in the imposition of conditions which "significantly confine[d] and restrain[ed] his freedom[.]" such that he was effectively in the custody of the Parole board. *Id.*

Ten years later, in *Hensley, supra*, the Court decided the issue of whether a person, who remained free on his own recognizance pending the stay of his one-year jail sentence, was "in custody" within the meaning of the federal habeas corpus statute. The Court said:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty . . . an extraordinary remedy whose . . . use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

411 U.S. at 351 (emphasis supplied).

The Court concluded that Hensley was "in custody" because he was subject to severe restraints which were not generally shared by the public. *Id.*, citing to *Jones*, 371 U.S. at 240.

Specifically, the conditions of Hensley's release on his own recognizance status required him to appear at all times and places as ordered by any court or magistrate and prevented him from coming and going as he pleased. Consequently Hensley's freedom of movement rested in the hands of state judicial officers who could "demand his presence at any time and without a moment's notice." *Id.* The Court noted that the prosecution had "emphatically indicated its determination to put [Hensley] behind bars," had "taken every possible step to secure that result[,]" and that he remained free "only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court." 411 U.S. at 351. The Court found significant the condition that Hensley's willful failure to appear as ordered was itself a criminal offense, and if he were apprehended outside of the state after failing to appear, he waived extradition. 411 U.S. at 348. The Court further noted that Hensley was certain to be incarcerated, and his incarceration was not "a speculative possibility that depend[ed] on a number of contingencies over which he ha[d] no control." 411 U.S. at 351-52.

In concluding that the restrictions imposed upon Hensley were "severe," the Court acknowledged that Jones, a parolee, was subject to even greater restrictions on his liberty. 411 U.S. at 348-49. Consequently, as clarified in *Hensley* the restrictions imposed upon Jones' freedom of movement were "severe" as well. Thus, as the threshold issue, any restraint must be shown to be "severe."

*Jones* and *Hensley* stress that the writ of habeas corpus is reserved as a remedy for "severe restraints on individual liberty," and restrict its use to cases of "special urgency." *Jones*, 371 U.S. at 243; *Hensley*, 411 U.S. at 351. Petitioners submit that the "severe restraint" and "spe-

cial urgency" the Court contemplated is where a person faces the possibility of imminent incarceration. In *Jones*, were petitioner to violate the terms and conditions of his parole, he faced being "thrown back in jail to finish serving . . . [his] sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with a crime." 371 U.S. at 242. In *Hensley*, Petitioner Hensley's incarceration was unavoidable once the "obstacle of the stay [was] removed." 411 U.S. at 351-52. Thus, the imminence of incarceration without the benefit of procedural safeguards is of primary concern in cases where this Court has accepted jurisdiction over habeas challenges, although the petitioner was not actually incarcerated. *Accord, Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 301 (1984) (where petitioner was released on his own recognizance pending retrial, he was "in custody" where he was obligated to appear for jury trial, otherwise he could be required, without further trial, to serve the two-year jail term originally imposed); *see also Lefkowitz v. Newsome*, 420 U.S. 283, 284-86 at n. 2 (1975) (held that petitioner was "in custody" where he was sentenced to ninety days in jail but released on bail pending final disposition of his case); *Mabry v. Johnson*, 467 U.S. 504, 507 at n. 3 (1984) (held that petitioner was "in custody" while on parole status from prior sentences and his petition concerned an attack on another sentence which was to run consecutive to the prior sentences); and, *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 509 and n. 10 (1983) (held that Hensley was "in custody" because his arrest was imminent, but petitioner's sons in foster placement were not "in custody" because they did not suffer a restraint on their liberty as was experienced by Jones and Hensley).

In the instant case, the Ninth Circuit cited to both

*Jones* and *Hensley,* and stated:

> The sentence in this case, requiring appellant's physical presence at a particular place, significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for jurisdictional purposes, as "custody." Appellant "cannot come and go as he pleases." *Hensley,* 411 U.S. at 351, 93 S.Ct. at 1575. Moreover, appellant suffers a greater restraint upon his liberty — mandatory class attendance — than the restraint suffered by a person who is released upon his own recognizance. *See id.* at 351-53, 93 S.Ct. at 1574-76[.]

995 F.2d at 923.

However, although the Ninth Circuit referred to *Hensley* in its decision, it nevertheless failed to apply the *Hensley* standard, and concluded that any restraint of Respondent satisfied the jurisdictional "in custody" requirement for federal habeas purposes. Further, as the ensuing discussion illustrates, the Ninth Circuit's failure to apply the controlling *Hensley* standard resulted in the absurd conclusion that Respondent's required class attendance exceeded the "severe restraint" imposed on Hensley.

Hensley was obligated to appear at any and all times and places as ordered by any court or magistrate, he could not come and go as he pleased, and his freedom of movement rested in the hands of judicial officers who could "demand his presence at any time and without a moment's notice." *Hensley,* 411 U.S. at 351.

In contrast, Respondent experienced no such re-

straint as a result of class attendance. Although class attendance was mandated, Respondent had the exclusive right to choose and arrange the most convenient time at which he could attend. He was also given the power to decide the duration of the classes, i.e., either a three- or five-day program. *See Dow*, 995 F.2d at 922-23. Unlike Petitioner Hensley, Respondent thus retained substantial control over his class attendance. Other than the fourteen hours of class, he was free to do all "those things which in this country free men are entitled to do[,]" *Jones*, 371 U.S. at 243, and could "come and go as he please[d]." *Hensley*, 411 U.S. at 351. Unlike Petitioner Hensley, Respondent remained free to leave this state or to travel about the islands if he so chose, without being required to sign a waiver of extradition. *See Hensley*, 411 U.S. at 348.

Moreover, Hensley's incarceration was imminent. He remained free only by the grace of a stay, but once the "obstacle of the stay [was] removed[,]" he would be incarcerated. *Hensley*, 411 U.S. at 351-52. Unlike Hensley, Respondent's liberty was not curtailed in any significant way as a result of his being sentenced to mandatory class attendance. He was not sentenced to incarceration at all, but any incarceration would necessarily result from a contempt of court proceeding, and only after a trial on that charge, guaranteeing him the full panoply of procedural safeguards. *Cf. Justices of Boston Municipal Court v. Lydon, supra*. Unlike Hensley, who had little or no control over whether he would ultimately be incarcerated, Respondent "truly holds the keys to the jailhouse door." *See Dremann v. Francis*, 828 F.2d 6, 7 (9th Cir. 1987) (original sentence of a fine had no provision for incarceration, and possibility of such arose only where defendant willfully refused to pay the fine, thus he "truly

h[e]ld the keys to the jailhouse door"). Unlike Hensley, Respondent's possibility of incarceration was remote at best, "a speculative possibility that depend[ed] on a number of contingencies over which he ha[d complete] control." *Hensley*, 411 U.S. at 352. As Respondent never argues he is unable to attend the classes, this case is one "where the unfolding of events may render the entire controversy academic." *Id.*

By failing to apply the correct standard, the Ninth Circuit plainly went far afield in ruling that the class attendance amounted to a restraint of Respondent's liberty which exceeded the severity of restraint in *Hensley*, virtually ignoring the correct standard enunciated by this Court in *Hensley* and its prodgeny. As the above discussion shows, no comparison can be made between *Hensley* and the instant case. Whereas the restraint suffered by Hensley was severe, the "restraint," if any, imposed upon Respondent was insignificant at best. The Ninth Circuit in this case simply read the "severe" out of this Court's "severe restraint" test. *Hensley*, 411 U.S. at 351; *see also* App. "N", attached, at 174a.

## II. This Court Should Grant Review To Correct The Ninth Circuit's Decision Because It Conflicts With Other Circuit Courts' Decisions Which Follow This Court's "Severe Restraint" Standard.

The United States Courts of Appeal have consistently ruled that jurisdiction will not lie under § 2254(a) unless a person faces the possibility of imminent incarceration. In determining the severity of restraint on individal liberty resulting from sentences such as a fine, a suspension of driving privileges, a disorderly conduct conviction, and a release on bail following conviction,

these courts have consistently referred to the standard set forth by this Court in *Hensley* in rendering its decisions. *See Tinder v. Paula*, 725 F.2d 801 (1st Cir. 1984); *Pringle v. Court of Common Pleas*, 744 F.2d 297 (3d Cir. 1984); *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976), cert. denied, 434 U.S. 825 (1977); *Spring v. Caldwell*, 692 F.2d 994 (5th Cir. 1982); *Turner v. State of Tennessee*, 858 F.2d 1201 (6th Cir. 1988); *Harts v. State of Indiana*, 732 F.2d 95 (7th Cir. 1984); *Russell v. City of Pierre, S.D.*, 530 F.2d 791 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir. 1990), and *Duvallon v. Florida*, 691 F.2d 483 (11th Cir. 1982).

Prior to the instant case, the Ninth Circuit has also followed the controlling standard as set out in *Hensley*. *See Dremann v. Francis*, 828 F.2d 6 (9th Cir. 1987) (following *Hensley*, held that a sentence of a fine contained no provision for incarceration and defendant had ultimate control over whether he would be incarcerated for a willful refusal to pay the fine, thus he was not "in custody"); *see also Edmunds v. Won Bae Chang*, 509 F.2d 39 (9th Cir.), *cert. denied*, 423 U.S. 825 (1975) (held that attorney against whom fine was imposed for contempt of court was not "in custody" under Supreme Court's standard in *Hensley* because the "special urgency" of imminent incarceration was not present).

In this case, however, the Ninth Circuit chose not to apply the *Hensley* standard and instead essentially ruled that any restraint imposed upon a person satisfied the jurisdictional requirement of § 2254(a). In failing to apply the correct standard, the *Hensley* standard, the Ninth Circuit's decision in this case conflicts with the decisions of other United States Courts of Appeal who have addressed the "in custody" jurisdictional requirement of § 2254(a). *See* Rule 10.1.(a), Rules of the Supreme

Court of the United States.

### III. This Court Should Grant Review Because the Issue Presented Herein is an Issue of Nationwide Importance Which This Court Should Address.

Apart from the conflicts with this Court's precedents and those of the lower courts, certiorari is warranted because, at a minimum, the Ninth Circuit has decided a recurring issue under the federal habeas statute, 28 U.S.C. § 2254, that is of nationwide import, and should be settled promptly by this Court.

At least thirty-six (36) states do not mandate any jail time for conviction upon a first drunk driving conviction. *See* United States Department of Justice, Sourcebook of Criminal Justice Statistics-1991 at 166 (tables). These states have the largest populations in the United States and include California, New York, Texas, Florida and Illinois. *Id.* The United States, in regulating the use of roads on public lands, has also made attendance at a drug/alcohol educational program a sole possible form of sentence for a first drunk driving conviction. *See United States v. Natchtigal*, 113 S.Ct. 1072, 1074 n.* (1993) (citing 18 U.S.C. § 3563(b) (1988)). This case is thus not confined to the State of Hawaii but raises an issue of nationwide import.

If the Ninth Circuit's decision were to stand, federal district courts would be flooded with frivolous habeas petitions. This is because persons convicted of drunk driving will pursue any available avenue of redress to avoid the financial impact a drunk driving conviction carries. While this factor plays no role in determining whether a convicted person is in "custody" for purposes of 28 U.S.C. § 2254, it does provide an incentive to make

use of the federal courts in this manner.

The Ninth Circuit's decision goes far beyond the facts of this case, and in so doing, threatens a major new burden for the United States District Courts. This Court's precedents simply do not authorize such a burden. For this reason also, this Court should grant certiorari.

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## CONCLUSION

For the foregoing reasons, this Court should reverse the Opinion of the Ninth Circuit in *Dow v. Circuit Court*, 995 F.2d 922 (9th Cir. 1993).

DATED: Honolulu, Hawaii: October 31, 1993.

Respectfully submitted,

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## APPENDIX "A"

## FOR PUBLICATION
## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| | ) | |
| *Petitioner-Appellant,* | ) | D.C. No. |
| | ) | CV-91-00139- |
| v. | ) | HMF |
| | ) | OPINION |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| *Respondent-Appellee.* | ) | |
| | ) | |

Appeal from the
United States District Court
for the District of Hawaii
Harold M. Fong,
Chief District Judge, Presiding

Argued and Submitted
May 7, 1993—Honolulu, Hawaii

Filed June 10, 1993

Before: Alfred T. Goodwin,
Thomas Tang, and John T. Noonan, Jr.,
Circuit Judges

Per Curiam

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**" SUMMARY"**

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed an order of the district court. The appellate court held that a person sentenced to attendance at an alcohol rehabilitation program was in custody for purposes of federal jurisdiction to hear his habeas corpus claim.

Appellant Dwight Dow was convicted in state court of driving while intoxicated and was sentenced to fourteen hours of attendance at an alcohol rehabilitation program, which could be scheduled over a period of either three or five days. He petitioned for habeas corpus relief in district court, alleging a double jeopardy violation in the state proceedings. The court held that it lacked jurisdiction of the matter because Dow was not in custody.

[1] The custody requirement is satisfied by a showing that there is a significant restraint on liberty that is not shared by the public generally, even if a person is not physically confined. Parolees and those released on their own recognizance pending appeals are in custody due to the restrictions and conditions placed upon their liberty. [2] Dow's sentence required his physical presence at a particular place and therefore significantly restrained his liberty. He was in custody within the meaning of the habeas corpus statute.

## COUNSEL

Earle A. Partington, Partington & Foley, Honolulu, Hawaii, for the petitioner-appellant.

Wallace W. Weatherwax, Deputy Prosecuting Attorney, City and County of Honolulu, Honolulu, Hawaii, for the respondents-appellees.

## OPINION

PER CURIAM:

Dow appeals the denial of a writ of habeas corpus. The district court found that it lacked jurisdiction to entertain this petition, holding that mandatory class attendance does not amount to a severe restraint on an individual's liberty and that appellant is therefore not "in custody" within the meaning of 28 U.S.C. §2254(a). We reverse.

Appellant was convicted by a Hawaii state court of one count of driving under the influence. He was sentenced to a $250 fine, a ninety-day suspension of his driver's license, and fourteen hours of attendance at an alcohol rehabilitation program. Attendance at the rehabilitation class could be scheduled by appellant over either a three-day or five-day period. Following his exhaustion of state appeals, appellant sought habeas corpus relief on the ground that, in obtaining his conviction, the state had violated the Double Jeopardy Clause.

To invoke federal habeas corpus review, the petition must be "in behalf of a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2254(a). The only question before us is whether the requirement of class attendance amounts to "custody" under 28 U.S.C. §2254(a).

[1] Although appellant is not subject to incarceration, the custody requirement of section 2254 may be met even if the petitioner is not physically confined. *Jones v. Cunningham,* 371 U.S. 236, 239-40 (1963). A petitioner on parole, for example, is "in custody" within the meaning of section 2254, because the parole restrictions "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Id.* at 243. Similarly, a petitioner who is released on his own recognizance pending appeal is also "in custody" due to "the conditions imposed on petitioner as the price of his release." *Hensley v. Municipal Court,* 411 U.S. 345, 348-49 (1973). *See also Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294, 300-02 (1984) (release on recognizance pending retrial); *Lefkowitz v. Mewsome,* 420 U.S. 283, 286 (1975) (release on bail pending appeal). Therefore, to satisfy the custody requirement, petitioner must demonstrate that he is subject to a significant restraint upon his liberty "not shared by the public generally." *Jones,* 371 U.S. at 240.

[2] The sentence in this case, requiring appellant's physical presence at a particular place, significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for jurisdictional purposes, as "custody." Appellant "cannot come and go as he pleases." *Hensley,* 411 U.S. at 351. Moreover, appellant suffers a greater restraint upon his liberty—mandatory class attendance—than the restraint suffered by a person who is released upon his own recognizance. *See id.* at 351-53 (holding that person released on recognizance is "in custody"). Because appellant is in custody within the meaning of 28 U.S.C. §2254, he is entitled to invoke federal habeas corpus jurisdiction.

The district court's judgment is reversed and the cause is remanded for further proceedings on the merits of the petition.

REVERSED and REMANDED.

## APPENDIX "B"

**NOT FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. |
| | ) | CV-91-00139- |
| v. | ) | HMF |
| | ) | ORDER |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| Respondent-Appellee. | ) | |
| | ) | |

Before: GOODWIN, TANG, and NOONAN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Tang and Noonan have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

## APPENDIX "C"

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| v. | ) | Hawaii (Honolulu) |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| Respondent-Appellee. | ) | |

**PETITION FOR REHEARING**

**and**

**CERTIFICATE OF SERVICE**

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV |
| | ) | 91-00139-HMF |
| v. | ) | Hawaii |
| | ) | (Honolulu) |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| Respondent-Appellee. | ) | |

**PETITION FOR REHEARING**

**I.**

**INTRODUCTION**

Respondents-Appellees, CIRCUIT COURT OF THE FIRST CIRCUIT, through the HONORABLE WENDELL K. HUDDY, Criminal Administrative Judge, and ROBERT A. MARKS, Attorney General of Hawaii, (hereinafter collectively referred to as "Respondents"), by and through James M. Anderson and Charlotte J.

Duarte, Deputy Prosecuting Attorneys, Department of the Prosecuting Attorney, City and County of Honolulu, State of Hawaii, hereby petition this Honorable Court for a rehearing.

This petition for rehearing is brought pursuant to Rule 40, Federal Rules of Appellate Procedure, and Rule 40-2, Rules of the United States Court of Appeals for the Ninth Circuit, and is based upon this Court's opinion in *Dow v. Circuit Court,* No. 92-15128 (9th Cir. June 10, 1993), holding that Petitioner, who was sentenced to fourteen hours of attendance at an alcohol rehabilitation program as a result of his drunk driving conviction, was "in custody" for purposes of invoking federal habeas corpus review under 28 U.S.C. Section 2254(a) (hereinafter "Section 2254(a)"). Respondents submit that the Court overly extended, and thus misapprehended, the custody requirement to include such class attendance.

## II.

## FACTUAL BACKGROUND

Petitioner-Appellant, DWIGHT O. DOW (hereinafter "Petitioner"), was convicted of Driving Under the Influence of Intoxicating Liquor, in violation of Section 291-4, Hawaii Revised Statutes. *See Dow v. Circuit Court of the First Circuit,* 779 F.Supp. 139 (D. Hawaii 1991). As the result of this conviction, Petitioner was sentenced to pay a $250 fine, and was also sentenced to a ninety-day driver's license suspension and to attend a fourteen-hour alcohol rehabilitation class. *Id.* at 139.

Petitioner appealed his conviction to the Hawaii Intermediate Court of Appeals ("ICA"), claiming a double jeopardy violation, and the ICA reversed Petitioner's con-

viction on that ground. *Id.* at 139-40. The ICA's ruling was appealed to the Hawaii Supreme Court, who reversed the ICA, and the case was remanded back to the ICA whereupon Petitioner's conviction was affirmed. *Id.* at 140.

After exhausting state remedies, Petitioner filed an application for writ of habeas corpus in the United States District Court for the District of Hawaii (hereinafter "district court"), claiming that his conviction was obtained in violation of the double jeopardy clause. *Id.* He claimed that the federal court had jurisdiction to entertain his application under Section 2254(a) because he was "in custody" by virtue of his being sentenced to a fourteen-hour alcohol rehabilitation class. *Id.* The alcohol rehabilitation class would be held over either a three- or five-day period, and Petitioner could elect to attend either the three-day program where he would attend classes for approximately four hours a day, or the five-day program where he would attend classes for approximately two and one-half hours a day. *Id.*; *see also* Record (hereinafter "R. at ___") at 7, Declaration of Pauline N. Namuo (hereinafter "Declaration"), at pars. 3-5. Failure to attend the classes would subject Petitioner to the issuance of "a bench warrant . . . on the ground that the person is in contempt." *Dow,* 779 F.Supp. at 140; *see also* R. at 7, Declaration, at par. 7.

The district court found Petitioner's argument unpersuasive, ruling that the requirement of attending classes a few hours each day, the short duration of the classes, i.e., two and one-half or four hours per day, for five or three days, and Petitioner's "fair amount of control over the scheduling of the classes[,]" did not amount to a significant infringement of Petitioner's liberty interests. *Dow,* 779 F.Supp at 141. The district court

concluded that the mandatory alcohol rehabilitation class requirement was insufficient to constitute a severe restraint on individual liberty for the purpose of habeas corpus relief, and dismissed Petitioner's application for lack of jurisdiction. *Id.*

Petitioner appealed from the denial of his application, and this Court reversed the district court's decision. *Dow v. First Circuit,* No. 92-15128 (9th Cir. June 10, 1993). In so doing, this Court cited to *Jones v. Cunningham,* 371 U.S. 236, 240 (1963), stating that in order "to satisfy the custody requirement, petitioner must demonstrate that he is subject to a significant restraint upon his liberty 'not shared by the public generally.'" *Dow, supra,* slip op. at 6073-74. This Court ruled that the requirement that Petitioner be physically present at a particular place significantly restrained his liberty "to do those things which free persons in the United States are entitled to do[,]" which resulted in his not being able to "come and go as he please[d,]" and thus, amounted to "custody." *Id.*, slip op. at 6074. This Court also cited *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973), stating that Petitioner's class attendance was a greater restraint on liberty than that suffered by a person released on his own recognizance pending appeal. *Dow, supra,* slip op. at 6074, *citing Hensley,* 411 U.S. at 351-53. This Court then concluded that Petitioner was in custody within the meaning of Section 2254(a). *Id.*

## III.

## ARGUMENT

**BECAUSE THERE IS SUCH A QUALITATIVE DIFFERENCE BETWEEN THE MERE INCONVENIENCE PETITIONER FACED IN COMPLETING A FOURTEEN-HOUR ALCOHOL REHABILITATION CLASS, AND THE SIGNIFICANT AND SEVERE RESTRAINTS IMPOSED UPON PETITIONERS IN *JONES, SUPRA,* AND *HENSLEY, SUPRA,* IT CANNOT BE CONSTRUED THAT PETITIONER WAS "IN CUSTODY" WITHIN THE MEANING OF SECTION 2254(a).**

Section 2254(a) provides that:

> [t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Thus, Petitioner must show that he is "in custody" as a prerequisite to invoking federal habeas corpus review. The United States Supreme Court has defined the term "in custody" in the cases of *Jones v. Cunningham,* 371 U.S. 236 (1963), and *Hensley v. Municipal Court,* 411 U.S. 345 (1973), cases upon which this Court heavily relied in issuing its opinion.

In *Jones, supra,* the issue before the Court was whether a state prisoner, placed on parole status, i.e., in the "custody and control" of the Parole Board, was "in

custody" and could consequently invoke federal habeas corpus review of his state sentence. *Jones,* 371 U.S. at 236-38. The Court indicated that the test in determining whether a petitioner was "in custody" was whether conditions and restrictions imposed upon the petitioner "significantly restrain[ed] petitioner's liberty to do those things which in this country free men are entitled to do." *Id.* at 243.

In reviewing the conditions and restrictions placed upon the petitioner by the Parole Board in *Jones,* the Court indicated that such conditions and restrictions constituted "significant restraints" which were "in addition to those imposed by the State upon the public generally." *Id.* at 241-42. The Court pointed out that petitioner was confined to a particular community, house and job, could not drive a car without permission, was required to periodically report to his parole officer, was required to permit the officer to visit his home and job at any time, was required to follow the officer's advice, and was admonished to keep good company, good hours, work regularly, keep away from undesirable places, and to live a clean, honest and temperate life. *Id.* at 242. As noted by the Court, the petitioner lived in constant fear that a single deviation from the conditions imposed upon him could result in his arrest at any time the parole officer believed such violation occurred, whereupon he could be returned to prison. *Id.* The Court concluded that such conditions placed upon petitioner "significantly confine[d] and restrain[ed] his freedom[,]" and effectively kept him in the custody of the Parole Board within the meaning of the habeas corpus statute. *Id.* at 243.

In *Hensley, supra,* the issue before the Court was whether a person released on his own recognizance, pending execution of sentence, was "in custody" within the

meaning of the federal habeas corpus statute. *Hensley*, 411 U.S. at 345-46. The California Penal Code provided that a person giving bail and then released on his own recognizance must agree in writing that he will appear "at all times and places as ordered by the court or magistrate releasing him[,]" that if he fails to appear as ordered and is found outside of California, he waives extradition, and "[a]ny court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance[.]" *Id.* at 348.[1] The Court stated that:

> [t]he custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

*Hensley*, 411 U.S. at 351 (emphasis supplied.

The Court held that petitioner was subject to restraints "not shared by the public generally," in that he was obligated to appear "at all times and places" as ordered by "[a]ny court or magistrate of competent jurisdiction." *Id.* (citations omitted). The Court indicated

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[1]The court also pointed out that California law provided that petitioner was subject to re-arrest if he failed to appear as agreed, and that such failure constituted a criminal offense. *Hensley*, 411 U.S. at 348.

that petitioner could not come and go as he pleased, his freedom of movement rested in the hands of state judicial officers who could demand his presence at a moment's notice, and failure to obey such a demand constituted a criminal offense. *Id.* The Court pointed out that petitioner remained free only by the grace of a stay, that the State had emphatically indicated its resolve to incarcerate him, and that his incarceration was not "a speculative possibility that depend[ed] on a number of contingencies over which he ha[d] no control." *Id.* at 351-52. The Court concluded that petitioner was "in custody." *Id.* at 352-53.

It is well-settled that not every restraint on liberty is sufficient enough to invoke the habeas corpus statute. *See, e.g., Hart v. State of Indiana,* 732 F.2d 95, 96 (1984). This Court, as well as other Courts of Appeal, have held that sentences associated with drunk driving, such as the payment of fines or the suspension of drivers' licenses, do not constitute significantly severe restraints upon a person's liberty so that the person so sentenced could be deemed "in custody" for purposes of federal habeas corpus review. *See, e.g., Dremann v. Francis,* 828 F.2d 6 (9th Cir. 1987); *Westberry v. Keith,* 434 F.2d 623 (5th Cir. 1970); and *Hart, supra.* Respondents submit that class attendance, by its very nature, is more analogous to the payment of a fine or a license suspension than to a release on recognizance.

The "restraint" on Petitioner's liberty in the instant case, i.e., class attendance, is a far cry from the restraints on the liberty of the petitioners in *Jones, supra,* and *Hensley, supra.* In its opinion, this Court indicated that Petitioner suffered a greater restraint upon his liberty than the restraint petitioner suffered in *Hensley. See Dow, supra,* slip op. at 6074. However, a comparison of the restraints on liberty experienced by Petitioner here

and the petitioner in *Hensley*, reveals that this is not the case.

Unlike the petitioner in *Hensley*, Petitioner here was not obligated to appear "at all times and places" as ordered by either the court, a magistrate, or any court officer. *Hensley, supra*. Moreover, unlike the petitioner in *Hensley*, whose incarceration was a certainty and not merely a speculative possibility, dependant upon a number of contingencies over which he had no control, Petitioner here had full control in avoiding the remote and speculative possibility of incarceration by attending the alcohol rehabilitation classes. *Hensley*, 411 U.S. at 351-52; *see also Dremann*, 828 F.2d at 7 ("While every criminal fine raises the possibility of confinement if not paid, such potential confinement is considered too speculative to warrant federal habeas corpus protection . . . [T]he defendant had the choice of whether to pay the fine or go to jail.").

Nor, in the instant case, was Petitioner placed on parole, or confined to a certain community, house, and job, unlike the petitioner in *Jones*. *Jones*, 371 U.S. at 242. Unlike the petitioner in *Jones*, Petitioner here was not required to report periodically to a court officer, or required to allow the officer to visit his home and work at any time. *Id.* Petitioner, in fact, was not required to work at all, but could keep whatever company he wished, and could come and go as he pleased. *Id.*; *see also Hensley*, 411 U.S. at 351.

The alleged "restraint" on Petitioner's liberty which he must "endure" in this case is insignificant. It entails a matter of hours, over a three- or five-day period. Petitioner can actually choose to complete the mandatory alcohol rehabilitation class in three days at about four hours per day, or he can choose to attend class two and

one-half hours a day for five days, and he is certainly free to do whatever else he pleases even during the week he chooses to attend classes. This simply cannot be construed of as a "severe restraint on individual liberty[,]" *Hensley,* 411 U.S. at 351, or a significant restraint which impaired Petitioner's liberty "to do those things which in this country free men are entitled to do[,]" *Jones,* 371 U.S. at 243, and is, at best, an inconvenience.

## IV.

## CONCLUSION

Because there is such a qualitative difference in the inconvenience Petitioner faces in completing a fourteen-hour alcohol rehabilitation class, as opposed to the significant and severe restraints imposed upon the petitioners in *Jones, supra*, and *Hensley, supra,* Petitioner cannot be construed of as being "in custody" within the meaning of 28 U.S.C. Section 2254(a).

Dated at Honolulu, Hawaii: June 22, 1993.

Respectfully submitted,
STATE OF HAWAII
Respondents-Appellees

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\James M. Anderson
JAMES M. ANDERSON
CHARLOTTE J. DUARTE
Deputy Prosecuting Attorneys
City and County of Honolulu

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| v. | ) | Hawaii (Honolulu) |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| Respondent-Appellee. | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 1993, one (1) copy of the Petition for Rehearing was mailed to:

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Deputy Prosecuting Attorneys
City and County of Honolulu

## APPENDIX "D"

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| v. | ) | Hawaii |
| | ) | (Honolulu) |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| Respondent-Appellee. | ) | |

**SUGGESTION FOR REHEARING EN BANC**

**and**

**CERTIFICATE OF SERVICE**

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| v. | ) | Hawaii |
| | ) | (Honolulu) |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| Respondent-Appellee. | ) | |

**SUGGESTION FOR REHEARING EN BANC**

**I.**

**INTRODUCTION**

Respondents-Appellees, CIRCUIT COURT OF THE FIRST CIRCUIT, through the HONORABLE WENDELL K. HUDDY, Criminal Administrative Judge, and ROBERT A. MARKS, Attorney General of Hawaii (hereinafter collectively referred to as "Respondents"), by and through James M. Anderson and Charlotte J. Duarte, Deputy Prosecuting Attorneys, Department of the Prosecuting Attorney, City and County of Honolulu, State of Hawaii, hereby suggests that this case would be

appropriate for a rehearing *en banc*.

This suggestion for rehearing *en banc* is made pursuant to Rule 35(b), Federal Rules of Appellate Procedure and Rule 35-1, Rules of the United States Court of Appeals for the Ninth Circuit Rules inasmuch as this Court's Opinion in *Dow v. Circuit Court,* No. 92-15128 (9th Cir. June 10, 1993), holding that Petitioner, who was sentenced to fourteen hours of attendance at an alcohol rehabilitation program as a result of his drunk driving conviction, was "in custody" for purposes of invoking federal habeas corpus review under 28 U.S.C. Section 2254(a) (hereinafter "Section 2254(a)") conflicts with the U.S. Supreme Court's interpretation of when a petitioner is deemed to be "in custody."

## II.

## FACTUAL BACKGROUND

Petitioner-Appellant, DWIGHT O. DOW (hereinafter "Petitioner"), was convicted of Driving Under the Influence of Intoxicating Liquor, in violation of Section 291-4, Hawaii Revised Statutes. *See Dow v. Circuit Court of the First Circuit,* 779 F.Supp. 139 (D. Hawaii 1991). As the result of this conviction, Petitioner was sentenced to pay a $250 fine, and was also sentenced to a ninety-day driver's license suspension and to attend a fourteen-hour alcohol rehabilitation class. *Id.* at 139.

Petitioner appealed his conviction to the Hawaii Intermediate Court of Appeals ("ICA"), claiming a double jeopardy violation, and the ICA reversed Petitioner's conviction on that ground. *Id.* at 139-40. The ICA's ruling was appealed to the Hawaii Supreme Court, who reversed the ICA, and the case was remanded back to the

ICA whereupon Petitioner's conviction was affirmed. *Id.* at 140.

After exhausting state remedies, Petitioner filed an application for writ of habeas corpus in the United States District Court for the District of Hawaii (hereinafter "district court"), claiming that his conviction was obtained in violation of the double jeopardy clause. *Id.* He claimed that the federal court had jurisdiction to entertain his application under Section 2254(a) because he was "in custody" by virtue of his being sentenced to a fourteen-hour alcohol rehabilitation class. *Id.* The alcohol rehabilitation class would be held over either a three- or five-day period, and Petitioner could elect to attend either the three-day program where he would attend classes for approximately four hours a day, or the five-day program where he would attend classes for approximately two and one-half hours a day. *Id.*; *see also* Record (hereinafter "R. at ___") at 7, Declaration of Pauline N. Namuo (hereinafter "Declaration"), at pars. 3-5. Failure to attend the classes would subject Petitioner to the issuance of "a bench warrant . . . on the ground that the person is in contempt." *Dow*, 779 F.Supp. at 140; *see also* R. at 7, Declaration, at par. 7.

The district court found Petitioner's argument unpersuasive, ruling that the requirement of attending classes a few hours each day, the short duration of the classes, i.e., two and one-half or four hours per day, for five or three days, and Petitioner's "fair amount of control over the scheduling of the classes[,]" did not amount to a significant infringement of Petitioner's liberty interests. *Dow*, 779 F.Supp at 141. The district court concluded that the mandatory alcohol rehabilitation class requirement was insufficient to constitute a severe restraint on individual liberty for the purpose of habeas

corpus relief, and dismissed Petitioner's application for lack of jurisdiction. *Id.*

Petitioner appealed from the denial of his application, and this Court reversed the district court's decision. *Dow v. First Circuit,* No. 92-15128 (9th Cir. June 10, 1993). In so doing, this Court cited to *Jones v. Cunningham,* 371 U.S. 236, 240 (1963), stating that in order "to satisfy the custody requirement, petitioner must demonstrate that he is subject to a significant restraint upon his liberty 'not shared by the public generally.'" *Dow, supra,* slip op. at 6073-74. This Court ruled that the requirement that Petitioner be physically present at a particular place significantly restrained his liberty "to do those things which free persons in the United States are entitled to do[,]" which resulted in his not being able to "come and go as he please[d,]" and thus, amounted to "custody." *Id.*, slip op. at 6074. This Court also cited *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973), stating that Petitioner's class attendance was a greater restraint on liberty than that suffered by a person released on his own recognizance pending appeal. *Dow, supra,* slip op. at 6074, *citing Hensley,* 411 U.S. at 351-53. This Court then concluded that Petitioner was in custody within the meaning of Section 2254(a). *Id.*

## III.

## ARGUMENT

**BECAUSE THERE IS SUCH A QUALITATIVE DIFFERENCE BETWEEN THE MERE INCONVENIENCE PETITIONER FACED IN COMPLETING A FOURTEEN-HOUR ALCOHOL REHABILITATION CLASS, AND THE SIGNIFICANT AND SEVERE RESTRAINTS IMPOSED UPON PETITIONERS IN *JONES, SUPRA,* AND *HENSLEY, SUPRA,* IT CANNOT BE CONSTRUED THAT PETITIONER WAS "IN CUSTODY" WITHIN THE MEANING OF SECTION 2254(a).**

Section 2254(a) provides:

> [T]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Thus, Petitioner must show that he is "in custody" as a prerequisite to invoking federal habeas corpus review. The United States Supreme Court has defined the term "in custody" in the cases of *Jones v. Cunningham,* 371 U.S. 236 (1963), and *Hensley v. Municipal Court,* 411 U.S. 345 (1973), cases upon which this Court heavily relied in issuing its opinion.

In *Jones, supra,* the issue before the Court was

whether a state prisoner, placed on parole status, i.e., in the "custody and control" of the Parole Board, was "in custody" and could consequently invoke federal habeas corpus review of his state sentence. *Jones,* 371 U.S. at 236-38. The Court indicated that the test in determining whether a petitioner was "in custody" was whether conditions and restrictions imposed upon the petitioner "significantly restrain[ed] petitioner's liberty to do those things which in this country free men are entitled to do." *Id.* at 243.

In reviewing the conditions and restrictions placed upon the petitioner by the Parole Board in *Jones*, the Court indicated that such conditions and restrictions constituted "significant restraints" which were "in addition to those imposed by the State upon the public generally." *Id.* at 241-42. The Court pointed out that petitioner was confined to a particular community, house and job, could not drive a car without permission, was required to periodically report to his parole officer, was required to permit the officer to visit his home and job at any time, was required to follow the officer's advice, and was admonished to keep good company, good hours, work regularly, keep away from undesirable places, and to live a clean, honest and temperate life. *Id.* at 242. As noted by the Court, the petitioner lived in constant fear that a single deviation from the conditions imposed upon him could result in his arrest at any time the parole officer believed such violation occurred, whereupon he could be returned to prison. *Id.* The Court concluded that such conditions placed upon petitioner "significantly confine[d] and restrain[ed] his freedom[,]" and effectively kept him in the custody of the Parole Board within the meaning of the habeas corpus statute. *Id.* at 243.

In *Hensley, supra,* the issue before the Court was

whether a person released on his own recognizance, pending execution of sentence, was "in custody" within the meaning of the federal habeas corpus statute. *Hensley*, 411 U.S. at 345-46. The California Penal Code provided that a person giving bail and then released on his own recognizance must agree in writing that he will appear "at all times and places as ordered by the court or magistrate releasing him[,]" that if he fails to appear as ordered and is found outside of California, he waives extradition, and "[a]ny court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance[.]" *Id.* at 348.[1] *Hensley*, 411 U.S. at 348. The Court stated that:

> [t]he custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.
>
> *Hensley*, 411 U.S. at 351 (emphasis supplied).

The Court held that petitioner was subject to restraints "not shared by the public generally," in that he was obligated to appear "at all times and places" as or-

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[1] The Court also pointed out that California law provided that petitioner was subject to re-arrest if he failed to appear as agreed, and that such failure constituted a criminal offense.

dered by "[a]ny court or magistrate of competent jurisdiction." *Id.* (citations omitted). The Court indicated that petitioner could not come and go as he pleased, his freedom of movement rested in the hands of state judicial officers who could demand his presence at a moment's notice, and failure to obey such a demand constituted a criminal offense. *Id.* The Court pointed out that petitioner remained free only by the grace of a stay, that the State had emphatically indicated its resolve to incarcerate him, and that his incarceration was not "a speculative possibility that depend[ed] on a number of contingencies over which he ha[d] no control." *Id.* at 351-52. The Court concluded that petitioner was "in custody." *Id.* at 352-53.

It is well-settled that not every restraint on liberty is sufficient enough to invoke the habeas corpus statute. *See, e.g., Hart v. State of Indiana,* 732 F.2d 95, 96 (7th Cir. 1984). This Court, as well as other Courts of Appeal, have held that sentences associated with drunk driving, such as the payment of fines or the suspension of drivers' licenses, do not constitute significantly severe restraints upon a person's liberty so that the person so sentenced could be deemed "in custody" for purposes of federal habeas corpus review. *See, e.g., Dremann v. Francis,* 828 F.2d 6 (9th Cir. 1987); *Westberry v. Keith,* 434 F.2d 623 (5th Cir. 1970); and *Hart, supra.* Respondents submit that class attendance, by its very nature, is more analogous to the payment of a fine or a license suspension than to a release on recognizance.

The "restraint" on Petitioner's liberty in the instant case, i.e., class attendance, is a far cry from the restraints on the liberty of the petitioners in *Jones, supra,* and *Hensley, supra.* In its opinion, this Court indicated that Petitioner suffered a greater restraint upon his liberty than the restraint petitioner suffered in *Hensley. See*

*Dow, supra*, slip op. at 6074. However, a comparison of the restraints on liberty experienced by Petitioner here and the petitioner in *Hensley*, reveals that this is not the case.

Unlike the petitioner in *Hensley*, Petitioner here was not obligated to appear "at all times and places" as ordered by either the court, a magistrate, or any court officer. *Hensley, supra.* Moreover, unlike the petitioner in *Hensley,* whose incarceration was a certainty and not merely a speculative possibility, dependant upon a number of contingencies over which he had no control, Petitioner here had full control in avoiding the remote and speculative possibility of incarceration by attending the alcohol rehabilitation classes. *Hensley,* 411 U.S. at 351-52; *see also Dremann,* 828 F.2d at 7 ("While every criminal fine raises the possibility of confinement if not paid, such potential confinement is considered too speculative to warrant federal habeas corpus protection . . . [T]he defendant had the choice of whether to pay the fine or go to jail.").

Nor, in the instant case, was Petitioner placed on parole, or confined to a certain community, house, and job, unlike the petitioner in *Jones. Jones,* 371 U.S. at 242.

Unlike the petitioner in *Jones,* Petitioner here was not required to report periodically to a court officer, or required to allow the officer to visit his home and work at any time. *Id.* Petitioner, in fact, was not required to work at all, but could keep whatever company he wished, and could come and go as he pleased. *Id.*; *see also Hensley,* 411 U.S. at 351.

The alleged "restraint" on Petitioner's liberty which he must "endure" in this case is insignificant. It entails a matter of hours, over a three- or five-day period. Petitioner can actually choose to complete the mandatory

alcohol rehabilitation class in three days at about four hours per day, or he can choose to attend class two and one-half hours a day for five days, and he is certainly free to do whatever else he pleases even during the week he chooses to attend classes. This simply cannot be construed of as a "severe restraint on individual liberty[,]" *Hensley*, 411 U.S. at 351, or a significant restraint which impaired Petitioner's liberty "to do those things which in this country free men are entitled to do[,]" *Jones*, 371 U.S. at 243, and is, at best, an inconvenience.

## IV.

## CONCLUSION

Because there is such a qualitative difference in the inconvenience Petitioner faces in completing a fourteen-hour alcohol rehabilitation class, as opposed to the significant and severe restraints imposed upon the petitioners in *Jones, supra,* and *Hensley, supra,* Petitioner cannot be construed of as being "in custody" within the meaning of 28 U.S.C. Section 2254(a).

Dated at Honolulu, Hawaii: June 23, 1993.

Respectfully submitted,

STATE OF HAWAII
Respondents-Appellees

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\JAMES M. ANDERSON
JAMES M. ANDERSON
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Deputy Prosecuting Attorneys
City and County of Honolulu

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| v. | ) | Hawaii |
| | ) | (Honolulu) |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| Respondent-Appellee. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 1993, one (1) copy of the Suggestion for Rehearing *En Banc* was mailed to:

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## APPENDIX "E"

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| v. | ) | Hawaii |
| | ) | (Honolulu) |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| Respondent-Appellee. | ) | |

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW | ) | No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| v. | ) | Hawaii (Honolulu) |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | |
| | ) | |
| Respondent-Appellee. | ) | |

**AMENDED CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 1993, one (1) copy of the Petition for Rehearing was incorrectly mailed to:

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I further certify that on June 22, 1993, one (1) copy of the Petition for Rehearing was correctly mailed to:

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/s/JAMES M. ANDERSON
JAMES M. ANDERSON
CHARLOTTE J. DUARTE
Deputy Prosecuting Attorneys
City and County of Honolulu

## APPENDIX "F"

## IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Petitioner-Appellee, vs.

DWIGHT DOW, Respondent-Appellant

NO. 13610

(CRIMINAL NO. 87-0096)

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

February 13, 1991

LUM, C.J., PADGETT, HAYASHI, WAKATSUKI AND MOON, JJ.

AUTOMOBILES -- offenses and prosecutions — offenses and violations — driving while intoxicated.

Under Hawaii Revised Statutes (HRS) § 291-4(a), driving under the influence of intoxicating liquor (DUI) is one offense that must be tried at one time; a trial court should not "acquit" a defendant of part of a DUI offense.

CRIMINAL LAW — direction of verdict — of acquittal — in general.

Under Rule 29(a), Hawaii Rules of Penal Procedure (HRPP), a court may not acquit a defendant of less than the entire offense of DUI.

SAME — former jeopardy — acquittal.

Where the trial court did not intend to dismiss the entire offense of DUI when entering a judgment of acquittal on count under HRS § 291-4(a)(1), but only intended to rule against the State with respect to one method of proving DUI, the trial court in reality did not acquit defendant but instead made a factual finding.

SAME — direction of verdict — of acquittal — in general.

Where the trial court did not have authority under HRPP 29(a) to enter a judgment of acquittal as to less than the entire offense of DUI, judgment of acquittal on the count under HRS § 291-4(a)(1) was not valid.

SAME — former jeopardy — acquittal.

The fact that a judgment of acquittal was entered in an earlier trial is not dispositive of whether double jeopardy is implicated in a second trial; court on appeal is compelled to examine the circumstances of the judgment to decide whether the principle of double jeopardy proscribes further prosecution.

SAME — same — same.

A trial court's characterization of its action as an "acquittal" does not necessarily make the action a true acquittal.

SAME — same — same.

Trial court's "acquittal" of defendant on charge under HRS § 291-4(a)(1) only resolved factual elements of one method of proving DUI offense; under HRS § 291-4(a)(2), there remained to the State a completely separate method of proving the offense.

SAME — same — same.

Where the trial court entered a judgment of acquittal on HRS § 291-4(a)(1) count, which was only part of DUI offense, judgment of acquittal was in form only and not in substance. Defendant therefore was not twice

placed in jeopardy for the same offense when retried following a mistrial on the HRS § 291-4(a)(2) count.

## OPINION OF THE COURT BY MOON, J.

We granted certiorari to review a decision of the Intermediate Court of Appeals (ICA) reversing the judgment of conviction of defendant Dwight Dow (Dow) for driving under the influence of intoxicating liquor (DUI). The issue before us is whether the constitutional principle of double jeopardy bars the retrial of a defendant who had been charged with two counts of DUI pursuant to subsections (a)(1) and (a)(2) of Hawaii Revised Statutes (HRS) § 291-4 but was "acquitted" of one of the counts. We find that under such circumstances there is no double jeopardy bar, and we reverse the ICA's decision.

### I.

Dow was charged with DUI under HRS § 291-4(a)(1) (driving under the influence) (count I) and § 291-4(a)(2) (driving with a blood alcohol level of 0.10 percent or more) (count II) and tried before a jury. After the State rested, Dow moved for judgment of acquittal under Rule 29(a) of the Hawaii Rules of Penal Procedure (HRPP). The trial court granted the motion as to count I only, entered a "judgment of acquittal," and submitted the (a)(2) count to the jury. The jury was unable to reach a verdict on count II, and the court declared a mistrial. A second trial was scheduled on count II, and Dow filed a motion to dismiss on the ground of double jeopardy. The trial court denied the motion and trial commenced. The jury found Dow guilty of count II. After entry of the judgment of conviction, Dow appealed.

The ICA reversed, finding that since the trial court "acquitted" Dow under HRS § 291-4(a)(1) in the first trial, the second trial placed him twice in jeopardy for the same offense and thus violated the double jeopardy clauses of

both the United States and Hawaii Constitutions.[1] *State v. Dow,* No. 13610 (Haw. App. October 3, 1990). We granted the State's application for writ of certiorari.

## II.

The constitutional guarantee against double jeopardy "protects against a second prosecution for the same offense after acquittal." North Caroline v. Pearce, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause applies to all acquittals, whether "by jury verdict or by a direction of the court, either after the prosecution has completed its case or after all evidence is in." *United States v. Bernhardt,* 840 F.2d 1441, 1447 (9thCir.), cert. denied, 488 U.S. 954 (1988). In this case, if Dow were truly acquitted by the trial court during his first trial, a secondtrial would be prohibited. However, we find that Dow's acquittal was in form only; therefore the second trial, which led to his conviction, was constitutionally permissible.

## III.

The DUI statute, HRS § 291-4(a) (1985), provides as follows:

A person commits the offense of driving under the influence of intoxicating liquor if:

(1) The person operates or assumes actual physical control of the operation of any vehicle while

[1] The Double Jeopardy Clause of the fifth amendment to the United States Constitution provides in relevant part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 10 of the Hawaii Constitution provides, "nor shall any person be subject for the same offense to be twice put in jeopardy."

under the influence of intoxicating liquor; or

(2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

Previously, this court in *State v. Wacker*, 70 Haw. 332, 770 P.2d 420 (1989), treated subsection (a)(1) and (a)(2) of the DUI statute as two separate offenses. Wacker was charged under both HRS § 291-4(a)(1) and -4(a)(2). Pursuant to HRS § 701-109(2),[2] both charges were tried together. At trial, Wacker was acquitted of the (a)(1) count, however, the jury was unable to reach a verdict as to the (a)(2) count. Subsequently, the trial court dismissed the (a)(2) count based upon its belief that it was required to do so under HRS § 701-111(1).[3] The *Wacker* court concluded that "[t]he construction placed by the court below, on HRS § 701-111(1), leads to an untenable result, which frustrates the purpose of HRS § 701-109(2)." 70 Haw. at 333, 770 P.2d at 421. The *Wacker* court fur-

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[2] HRS § 701-109(2) (1985) provides:

(2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

[3] HRS § 701-111(1) (1985) provides in pertinent part:

Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution under any of the following circumstances:

(1) The former prosecution resulted in an acquittal which has not subsequently been set aside[.]

ther stated, "[b]ut for [HRS § 701-109(2)], [Wacker] could have been tried separately on the offenses under HRS § 291-4(a)(1) and -4(a)(2)." Id. (emphasis added). Following the rationale in *State v. Arakaki*, 7 Haw. App. 48, 744 P.2d 783 (1987),[4] this court concluded that double jeopardy did not bar a retrial of the (a)(2) count and remanded the case for further proceedings.

More recently, this court has held that the DUI statute provides two alternative means of proving a

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[4] Defendant Arakaki was found guilty of operating a motor vehicle not insured under a no-fault policy and DUI. With respect to the DUI offense, Arakaki contended and the State conceded on appeal, that "insufficient foundation was laid for the admission of the intoxilyzer test result and the evidence was improperly admitted." 7 Haw. App. at 55, 744 P.2d at 787. The question that remained was whether the case should be remanded for retrial.

At the original trial, the court specifically found Arakaki guilty of the DUI offense pursuant to subsection (a)(2), however, was silent regarding the (a)(1) charge. On appeal, the State requested that the case be remanded for a determination of Arakaki's guilt under the (a)(1) charge. Arakaki contended that such a remand would place him twice in jeopardy for the same offense. Keeping in mind that the ICA treated the (a)(1) and (a)(2) charges as separate offenses, it held that "the trial judge, the trier of fact, had full opportunity to render his decision on the HRS § 291-4(A)(1) charge." 7 Haw. App. at 56, 744 P.2d at 786. Having failed to do so, the ICA concluded that Arakaki could not be retried on the (a)(1) charge insofar as his "jeopardy for that offense came to an end at the conclusion of the bench trial." *Id.* The case, however, was remanded for retrial on the (a)(2) count based on the ICA's holding that "the trial court's admission of the intoxilyzer test result into evidence was a trial error. The Double Jeopardy Clause does not preclude the State from retrying [Arakaki] whose DUI is being set aside because of a trial error." 7 Haw. App. at 59, 744 P.2d at 789 (citation omitted).

single offense. *State v. Grindles*, 70 Haw. 528, 531, 777 P.2d 1187, 1190 (1989). In *Grindles,* defendant was charged with violating HRS § 291-4(a). At a bench trial, after the State's direct examination of the arresting officer, the court announced that it would bifurcate the hearing and take all testimony supporting the (a)(1) charge first. If the State made as case under that subsection, the court said it would not take evidence supporting the (a)(2) charge. The trial court found defendant guilty of violating HRS § 291-4(a)(1), and the case was concluded without further evidence regarding the (a)(2) charge.

On appeal of *Grindles,* this court, in a footnote, declined to adopt the "dictum" from *Wacker* which indicated that HRS § 291-4(a)(1) and -4(a)(2) are separate offenses. Following our pronouncement in *Grindles*, the statutory analysis employed in *Wacker* is no longer applicable. Therefore, to the extent that our opinion today is inconsistent with *Wacker*, we overrule the latter. We also overrule *Arakaki* to the extent that its analysis assumed that the separate counts under (a)(1) and (a)(2) represented two separate offenses.

In *Grindles*, this court found that bifurcation of the two methods of proof provided in § 291-4(a) into separate trials violated defendant's due process right to a fair trial. In another footnote, this court commented:

> We also note that bifurcation of a DUI trial into two separate hearings under HRS § 291-4(a)(1) and -4(a)(2) may subject the defendant to double jeopardy. In this case, jeopardy attached when the court began to hear the State's evidence. Appellant was not subjected to double jeopardy, however, since the trial court adjudicated him

> guilty at the conclusion of the State's proof under § 291-4(a)(1), and did not proceed to hold a second hearing under § 291-4(a)(2). However, in the event the defendant is acquitted under § 291-4(a)(1) and the court allows the State to proceed under § 291-4(a)(2), the defendant will have been twice placed in jeopardy for the same offense in violation of article I, section 10 of the Hawaii Constitution and the eighth [fifth] amendment to the U.S. Constitution.

70 Haw. at 533 n.3, 777 P.2d at 1191 n.3 (emphasis added). The ICA adopted this dictum from *Grindles* when it reversed Dow's conviction in the present case.[5] In doing so, however, the ICA overlooked the procedural context in which *Grindles* was decided and misplaced its reliance on the footnote in question.

This court in *Grindles* specifically disapproved of the bifurcation of the two methods of proof allowed by the DUI statute. While the trial court in *Grindles* erroneously bifurcated the DUI offense, defendant was not subjected to double jeopardy since the trial court adjudicated him guilty of the (a)(1) charge, thus negating a second hearing on the (a)(2) count. However, we predicted what the consequence of that error could have been: subjecting the defendant to double jeopardy if, after acquittal of one DUI count, there was a second trial

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[5] It is important to keep in mind that the trial court in *Dow* entered the acquittal on count I in June 1987. In August 1987, the ICA was treating two counts under the DUI statute as two offenses (*State v. Arakaki*, 7 Haw. App. 48, 744 P.2d 783 (1987)), as was this court as late as March 1989 (*State v. Wacker*, 70 Haw. 332, 770 P.2d 420 (1989)). *Grindles* was not decided until July 1989.

on the other DUI count. The thrust of our decision in *Grindles* is that there should never be bifurcation, in any form, of the single offense of DUI. As this court held, DUI is one offense that must be tried at one time. Therefore, a trial court should not "acquit" a defendant of part of a DUI offense.

This conclusion is buttressed by HRPP 29(a), which provides:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses alleged in the charge after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right.

(Emphasis added.) Although Dow urges that the trial court's action operated as an acquittal of the entire offense of DUI, thus barring a second trial following the mistrial on the (a)(2) count, the rule makes clear that the court may not acquit a defendant of less than the entire offense of DUI. We find, therefore, that the trial court erred in entering a judgment of acquittal.

Further, it is obvious from the record that the trial court did not intend to dismiss the entire offense since the case was submitted to the jury to consider the second method of proof. We find that the trial court did not acquit the defendant of anything. Instead, we conclude that

the trial court made a factual finding, equivalent to a jury's special verdict.

Dow, however, focuses on the fact that the trial court entered a "judgment of acquittal" instead of a finding of not guilty. Since only one judgment may be entered under HRS § 291-4(a), Dow submits that retrial is impermissible.

To reach the same conclusion as the defense in this case would require us to interpret the judgment of acquittal in a hypertechnical manner, elevating form over substance. The United States Supreme Court has emphasized on several occasions that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (citations omitted).

*Martin Linen* involved criminal contempt charges against defendant corporations. After the federal district court discharged a deadlocked jury, it granted defendants' motion and entered judgments of acquittal under Federal Rule of Criminal Procedure 29(c).[6] The district court granted the motion on the ground that the Government had failed to prove facts constituting criminal contempt, and commented that the case was the weakest the court had ever seen. 430 U.S. at 571-572. The Government appealed the acquittals to the Fifth Circuit Court of Appeals.

At issue on appeal was whether the trial court's acquittals on the basis of insufficiency of the evidence triggered double jeopardy protection when there were no verdicts of acquittal formally returned by the jury. The

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[6] HRPP 29 tracks the language of the federal rule.

Court of Appeals answered in the affirmative and dismissed the appeal.

The United States Supreme Court, on appeal, affirmed specifically stating that "it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S. at 572. The Supreme Court concluded that the judgments of acquittal entered by the district court "were acquittals in substance as well as form." 430 U.S. at 571-572.

Moreover, the Supreme Court emphasized that "valid judgments of acquittal were entered on the express authority of, and strictly in compliance with Rule 29(c)." 430 U.S. at 570. In contrast, as we have explained above, the trial court in *Dow* did not have the authority under HRPP 29(a) to enter a judgment of acquittal as to less than the entire offense of DUI, and the judgment thus was not strictly in compliance with the rule. On this basis alone, Dow's judgment of acquittal was not valid.

Of even greater importance is that in *Martin Linen,* the Supreme Court did not rely merely on the fact that judgments of acquittal had been entered as dispositive of whether double jeopardy was implicated; the Court looked beyond the judgments to determine their constitutional significance. 430 U.S. at 570-571. We are likewise compelled to examine the circumstances of the judgment in this case to decide whether the principle of double jeopardy proscribed further prosecution.

In deciding *Martin Linen,* the Supreme Court enunciated the test under which a defendant is deemed acquitted. A defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in defendant's favor], correct or not, of some or all of the factual elements of the offense charged." 430

U.S. at 571 (emphasis added). Dow argues that the *Martin Linen* test is applicable in barring the retrial since by entering a judgment of acquittal on the (a)(1) count, the judge resolved "some of the factual elements" of the DUI offense. We disagree. The trial court's characterization of its action as an "acquittal" and the ICA's acceptance of such characterization does not necessarily make it so. We reiterate that the trial court, in "acquitting" Dow, only resolved the factual elements of one method of proving the DUI offense, which was not fatal to the State's case as there remained a completely separate method of proving the offense. *See State v. Grindles*, 70 Haw. 528, 777 P.2d 1187 (1989).

The Supreme Court in *Martin Linen* did not have before it a charge that statutorily could have been proved in two independent ways. This distinction is critical to our determination that the test enunciated in *Martin Linen* is inapplicable to the instant case and that the judgment of acquittal in *Dow* was in form only and not in substance.

## IV.

Based on the foregoing, we conclude that Dow was not twice placed in jeopardy for the same offense when he was retried following a mistrial on the (a)(2) count, despite the trial court's entry of judgment of acquittal on the (a)(1) count. We therefore reverse theICA's decision and remand the case to the ICA for consideration of the issues raised on appeal other than double jeopardy.

/s/Herman T.F. Lum
/s/Frank Padgett
/s/Yoshimi Hayashi
/s/James Wakatsuki
/s/Ronald T.Y. Moon

On the briefs:
Charlotte Jean Duarte
Deputy Prosecuting Attorney
for petitioner-appellee

Earle A. Partington
(Partington & Foley)
for respondent-appellant

**APPENDIX "G"**
**[Appendices "AA" to "KK" omitted.]**

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1164 Bishop Street
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Attorneys for Respondents

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF HAWAII**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | CIVIL NO. 91-00139 |
| | ) | HMF |
| Petitioner, | ) | |
| | ) | ANSWER TO |
| vs. | ) | PETITION FOR |
| | ) | WRIT |
| | ) | WRIT OF HABEAS |
| | ) | CORPUS; |
| | ) | MEMORANDUM |
| CIRCUIT COURT OF | ) | OF LAW; |
| FIRST CIRCUIT, | ) | APPENDICES |
| et al., | ) | "AA to KK" and |
| | ) | CERTIFICATE OF |
| Respondents. | ) | SERVICE |
| | ) | |

**ANSWER TO PETITION FOR**
**WRIT OF HABEAS CORPUS**

Respondent, CIRCUIT COURT OF THE FIRST CIRCUIT, et al., through the Honorable Wendell K. Huddy, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, (hereinafter collectively referred to as "Respondents"), by and through Wallace W. Weatherwax, Esq., Deputy Prosecuting Attorney, Department of the Prosecuting Attorney, City and County of Honolulu, State of Hawaii, answers the allegations contained in the Petition under 28 U.S.C. Section 2254 for a Writ of Habeas Corpus (hereinafter "Petition") filed on March 7, 1991 and pursuant to the Court's Order to Show Cause, dated March 19, 1991; and Title 28, U.S.C. Section 2243 (hereinafter "28 U.S.C. Section 2254") and Rule 5, Rules Governing Section 2254 Cases (hereinafter "Rules").

Alternatively, Respondents move this Honorable Court for an Order dismissing the instant Petition in that this Court lacks jurisdiction to entertain the Petition because Petitioner has not satisfied the requirements of 28 U.S.C. Section 2254(a). Specifically, Petitioner is not presently incarcerated or otherwise in the custody of Respondents, was not incarcerated at the time the Petition was filed, is not facing a sentence which includes a period of incarceration or probation for his Driving Under the Influence ("DUI") conviction, and does not face parole from a sentence of imprisonment for his DUI conviction. Petitioner is presently at liberty on his own recognizance. *See* Appendices "GG" and "HH" and *cf.* Petitioner's Exhibit C to the Petition; *see also Dremann v. Francis,* 828 F.2d 6 (9th Cir. 1987) and *Harts v. Indiana* 732 F.2d 95 (7th Cir. 1984).

Respondents deny that Petitioner presents a cognizable claim before this Court. More specifically, assuming *arguendo* that Petitioner is in "custody," such

is not due to a "Conviction obtained by a [constitutional] violation of the protection against double jeopardy" (as stated at paragraph 12A. of the Petition).

Respondent denies the "12A. Supporting Facts" (attached sheet at p. 9 of the Petition) insofar as they purport to establish that Petitioner was charged, convicted and sentenced for two separate offenses; or that Petitioner was acquitted of the single offense of DUI, all as more fully detailed in the Memorandum of Law and Appendices attached hereto.

More specifically, Respondent denies the following characterization in Petitioner's "12A. Supporting Facts:"

> 30 Nov. 1987 State trial court files written judgment of acquittal as to Count I (true and correct copy attached as Exhibit B). (Emphasis ours).

As set out in the opinion of the Supreme Court of Hawaii in *State v. Dow,* 72 Haw. 56, ___ P.2d ___ (1991), the first trial court erred in entering a judgment of acquittal and its so called "judgment of acquittal" was a factual finding, equivalent to a ~~jury~~'s special verdict as to only one of the two methods of proof statutorily provided ~~for~~ in the "single offense" DUI statute. *See* Appendix "AA."

Respondents further assert that the issue addressed by the Hawaii Supreme Court's decision and the Hawaii Intermediate Court of Appeals are substantially identical to the issue raised in this Petition and that both are presumptively correct and should not be disturbed on collateral review by this Court. *See Oxborrow v. Erkenberry,* 877 F.2d 1395 (9th Cir. 1989), *cert. denied* 110 S.Ct. 334, 107 L.Ed.2d 332; *see also Sumner v. Mata,* 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) and

*Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Respondent admits Petitioner has exhausted his State remedies only as to the sole factual issue of whether the first trial court "acquitted" Petitioner or not.

Petitioner cites and challenges the judgment of conviction by the second trial judge, Judge Richard M. C. Lum, dated February 28, 1989 and filed February 29, 1989. On October 3, 1990, upon appeal to the Intermediate Court of Appeals ("ICA"), Judge Lum's conviction was reversed on the sole issue of double jeopardy. On February 13, 1991, upon *writ of certiorari*, the Hawaii Supreme Court reversed the ICA's determination of double jeopardy and remanded to the ICA for determination of other issues raised on appeal. By Memorandum Opinion dated March 7, 1991, the ICA affirmed Judge Lum's judgment of conviction. On March 27, 1991, the ICA's judgment on appeal and notice to the First Circuit Court was filed. Execution of the affirmed judgment is presently pending for motion and calendering. *See* Appendices "BB" to "FF." Respondent denies that the Petitioner has exhausted his State remedies as to such other issues or any implied "due process" violations.

No transcripts of the Petitioner's first trial were made a part of the record on appeal. Transcripts of Petitioner's second trial are available but are not attached hereto as Respondent believes that this Court can summarily determine the matter upon the presumptively correct written opinion of the Hawaii Supreme Court and the Intermediate Court of Appeals.

WHEREAS, Respondents respectfully pray that the Petition be dismissed for lack of jurisdiction, or, in the alternative, be denied.

Dated at Honolulu, Hawaii: April 19, 1991.

Respectfully submitted,

STATE OF HAWAII

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\WALLACE W. WEATHERWAX
Deputy Prosecuting Attorney
City and County of Honolulu

Attorneys for Respondents

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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF HAWAII**

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| DWIGHT O. DOW, | ) | CIVIL NO. 91-00139 |
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| Petitioner, | ) | |
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| CIRCUIT COURT OF | ) | |
| FIRST CIRCUIT, | ) | |
| et al., | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |

**MEMORANDUM OF LAW**

## I.

## INTRODUCTION

Petitioner Dow's petition fails in two material respects:

1. Petitioner fails to satisfy the "in custody" requirements of 28 U.S.C. Section 2254(a) and

2. Petitioner fails to set forth a constitutional violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

28 U.S.C. Section 2254(a) provides as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. (Emphasis added).

## II.

## ARGUMENT

### A. PETITIONER HAS FAILED TO SATISFY THE "IN CUSTODY" REQUIREMENT OF 28 SECTION 2254(A).

The instant petition sets forth the "Place of Confinement" as follows:

> Petitioner is on bail pending execution of sentence which was stayed pending appeal. Petitioner is not confined and has been at liberty

on his own recognizance throughout the State proceedings, both pre-judgment of conviction and post-judgment of conviction. (*See* Appendix "GG"). The judgment of conviction for "DUI," dated February 28, 1989 (filed February 29, 1989) provided for the following sentence:

1. Fourteen-hour minimum alcohol abuse rehabilitation program.

2. Ninety-day suspension of license, thirty-day absolute, sixty-day restricted to work and alcohol abuse treatment purposes.

3. Fine of $250.00, payable at Circuit Court, 777 Punchbowl Street, Honolulu, Hawaii.

4. Fine of $5.00, payable at Circuit Court, 777 Punchbowl Street, Honolulu, Hawaii.

5. Four (4) points. (H.R.S. Section 286-128).

The judgment of conviction also provided for "Sentence stayed pending Notice of Appeal." *See* paragraphs 1-4 and Exhibit C of the Petition. *See* Respondent's Appendix "HH."

As the result of his instant DUI conviction, Petitioner received a sentence which included a license suspension, fine and participation in a fourteen-hour alcohol rehabilitation program. Petitioner is not now incarcerated or on probation, and does not face a term of incarceration or probation should his conviction remain undisturbed. It is Respondents' position, based on these facts, that Petitioner is not in the custody of Respondents and thus fails to satisfy the jurisdictional requirements of 28 U.S.C. Section 2254.

As the instant Petition is being brought pursuant to 28 U.S.C. Section 2254, the relief provided for in this section can only be made available to Petitioner if he is now in custody or faces custody as the result of a judgment of a Hawaii state court. It is clear from the record

in this case that there is no Hawaii judgment which subjects Petitioner to incarceration, probation or parole. Therefore, it is Respondents' position that the Petition must be dismissed because Petitioner does not satisfy the "in custody" requirement of this section. The loss of Petitioner's driver's license, the payment of a fine and participation in a fourteen-hour program does not constitute the restraint of Petitioner's liberty requiring the availability of habeas corpus relief.

In *Harts v. Indiana,* 732 F.2d 95 (7th Cir. 1984), the defendant was arrested for DUI and following ~~his~~ arrest refused to submit to either a breath or blood test to determine his BAC. He was charged and convicted of refusing to submit to testing and was sentenced to a one year suspension of his driver's license. As stated by the 9th Circuit Court in *Harts*:

> In *Jones v. Cunningham* [citation omitted], Justice Black wrote that conditions which "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do . . . are enough to evoke [habeas corpus]. [citations omitted.] Not every restraint on liberty, however, is significant enough to meet this test. We agree with the district court that the suspension of driving privileges in this case is not a severe enough restraint on liberty to be properly characterized as "custody."

*Harts*, 732 F.2d at 96.

The Harts court went on to cite with approval *Westberry v. Keith,* 434 F.2d 623, 624-25 (5th Cir. 1970) in which it was determined that a fine and one year license revocation did not constitute "custody" within 28 U.S.C.

Section 2254. The Harts court also referred to *Whorley v. Brilhart,* 359 F.Supp. 539, 541-42 (E.D. Va. 1973) in which a ten year license suspension was not "custody."

The *Harts* court then stated:

> We recognize that, in our society, loss of driving privileges may entail hardship. However, suspension of driving privileges is not the sort of "severe restraint[ ] on individual liberty" for which habeas corpus relief is reserved. [citation omitted.]
>
> Because Harts is not "in custody" within the meaning of 28 U.S.C. Section 2254 he is not entitled to invoke the federal habeas corpus jurisdiction.

*Harts*, 732 F.2d at 97.

In a consistent manner, the 9th Circuit Court addressed the issue of whether a fine constituted "custody" within the context of 28 U.S.C. Section 2254.

In *Dremann v. Francis,* 828 F.2d 6 (9th Cir. 1987) an attorney was fined $500.00 for disobeying a court order and when he willfully refused to pay the fine, he was ordered incarcerated for the lesser of three days or until he paid the fine. In affirming the district court's dismissal of the defendant's habeas corpus petition for lack of subject matter jurisdiction, the 9th Circuit Court determined that the defendant was not incarcerated, had not received incarceration as a term on his original sentence, and would be incarcerated only if he failed to comply with the court-ordered payment of his fine. Under these circumstances, the fine itself did not place the defendant "in custody." Moreover, the threat of incarceration if he failed to pay the fine was based on factors entirely within the defendant's control and too speculative to satisfy the "in custody" requirement of 28 U.S.C. Section 2254. *See*

*Dremann v. Francis*, 828 F.2d at 7.

It is Respondents' position that, in applying both *Harts* and *Dremann* to the instant case, this Court also lacks subject matter jurisdiction over the instant Petition. Here, Petitioner does not face incarceration. He faces only a fine and a ninety day suspension of his driver's license, with the ability to drive on a limited basis during sixty days of the suspension period. Such a sentence does not satisfy the "in custody" requirement of 28 U.S.C. Section 2254(a).

Moreover, while it may be possible that he may face other charges should he fail to pay his fine or participate in the alcohol rehabilitation program, as in *Dremann*, those other possible sanctions depend entirely upon Petitioner's conduct. As such, they are too speculative to be considered "custody" within the meaning of 28 U.S.C. Section 2254.

Regarding Petitioner's participation in a fourteen-hour alcohol rehabilitation program, Respondents assert that this penalty is analogous to a fine. Participation in the program, like the payment of a fine, involves affirmative action by Petitioner. Such participation does nothing to curtail Petitioner's liberty or deprive him of liberty to which he is entitled as a citizen.

In *Dremann*, the 9th Circuit Court engaged in a three-part analysis of the facts of the case to determine whether incarceration until payment of a fine constituted "custody." First, the court determined that incarceration was not a part of the defendant's original sentence. Second, the defendant "truly held the keys to the jailhouse" because he faced incarceration only if he refused to pay the fine. Third, dismissal of the petition for habeas corpus relief would not be futile because it would not result in merely postponing the habeas corpus hearing.

*Dremann*, 828 F.2d at 7.

In applying the three-pronged analysis employed in *Dremann* to the facts of this case, the result would be the same. First, Petitioner was not sentenced to a term of incarceration. Second, Petitioner faces other sanctions which conceivably may include incarceration only if he fails to complete the sentence given to him. Thus, like the defendant in *Dremann*, Petitioner also holds the keys to his own jailhouse door. Third, Petitioner does not face imminent incarceration of any kind and dismissal of the instant Petition would not be futile and would not result in a mere postponement of a habeas corpus hearing. Therefore, Petitioner is not "in custody" for purposes of 28 U.S.C. Section 2254.

Finally, Petitioner may argue that he is "in custody" because the bail on his own recognizance to secure his release following his arrest is still pending. However, this argument is also without merit.

In *Lilios v. State of New Hampshire,* 788 F.2d 60 (1st Cir. 1986), the defendant had been sentenced to license suspensions and fines for two speeding violations. The defendant's state court appeals had all been resolved against him. The defendant then argued that because he was "in custody" because he had been released on bail regardless of whether he faced incarceration citing to the case of *Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294, 104 S.Ct. 1805, 1810, 80 L.Ed.2d 311 (1984).[1]

---

[1] In *Lydon*, the defendant was convicted as charged following a bench trial in Massachusetts and was sentenced to a jail term. Under Massachusetts law, a defendant convicted by bench trial has a right to request a trial *de novo* by jury but in so doing waives his right to appeal the bench trial verdict. The defendant chose to exercise this right and he was released on his own recognizance

(footnote continued)

Citing to both *Harts* and other cases relied upon by the 9th Circuit Court, the First Circuit Court determined that the defendant's fines and license suspensions did not constitute"custody" under 28 U.S.C. Section 2254. The *Lilios* court went on to state:

> But even if, at the time petitioner filed his Section 2254 petitions, he was on "bail" in the sense that execution of his sentences calling for fines and license suspension had been stayed, nothing in Lydon—a case involving a defendant who, unlike petitioner, was awaiting bail and potentially faced incarceration if convicted—suggests that the modest fines and temporary suspension to which petitioner is subject render petitioner "in custody" for section 2254 purposes.

*Lilios*, 788 F.2d at 61.

The *Lilios* court went on to state that it agreed with the positions taken by both the 9th and 5th Circuit Courts that a petitioner facing fines and a license suspension was not "in custody." *Lilios*, 788 F.2d at 61.

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(footnote [1] continued)

pending the jury trial. Before the jury trial could commence, the defendant moved unsuccessfully for a dismissal of the case on double jeopardy grounds and ultimately sought habeas corpus relief. *See Justices of Boston Municipal v. Lydon*, 466 U.S. 294, 297-298, 104 S. Ct.1805, 80 L.Ed.2d., 311, 317-18 (1986). The United States Supreme Court found the defendant to be "in custody" because the defendant's release was conditioned upon his appearing at the jury trial. Had he failed to appear, he would have been subject to the jail term with which he was sentenced following his bench trial conviction. *See Lydon,* 466 U.S. at 301.

Like the defendant in *Lilios*, and unlike the defendant in *Lydon,* Petitioner here is not facing a period of incarceration. Petitioner does not face even a threat of potential incarceration, nor is there such a limitation or restraint upon his freedom. Petitioner faces a sentence which includes only a fine, a license suspension and an instructional class. Such does not constitute "custody."

Under the totality of these circumstances, Petitioner has failed to establish that he is "in custody" within the meaning of 28 U.S.C. Section 2254. Therefore, Respondents request that this Court dismiss the instant Petition for lack of subject matter jurisdiction.

### B. PETITIONER FAILS TO SET FORTH A CONSTITUTIONAL VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner alleges that the "judgment of acquittal" (*see* Appendix "II *cf.*;" Exhibit B of Petition, dated and filed November 30, 1987) granted by Judge Sasaki following Petitioner's first trial in June 1987 precludes the second trial and conviction; and that the resulting judgment of conviction is therefore a "double jeopardy" violation. Consequently, Petitioner alleges that his "custody" is constitutionally improper.

The Supreme Court of Hawaii by Justice R. Moon addressed this issue directly upon *writ of certiorari* to the Intermediate Court of Appeals and found otherwise. *See State v. Dow,* 72 Haw. 56, ___ P.2d ___ (1991), on *cert. to the ICA,* at 8 Haw. App. ___ (No. 13160, October 3, 1990). Petitioner's Exhibit D and Respondent's Appendices "AA" to "EE."

Critical to the Supreme Court's decision was its finding that the "Judgment of Acquittal" was in form only and not a substantial determination as to the "single offense" of DUI. The court cited and distinguished *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (citations omitted), from the instant case stating as follows:

> The Supreme Court [U.S.] in *Martin Linen* did not have before it a charge that statutorily could have been proved in two independent ways. This distinction is critical to our determination that the test enunciated in *Martin Linen* is inapplicable to the instant case and that the judgment of acquittal in *Dow* was in form only and not in substance.

*Dow, supra,* at p. 65. The Court recognized the unique nature of the Hawaiian "DUI" statute that provides for a single offense with two independent methods of proof citing its own decision in *State v. Grindles,* 70 Haw. 528, 777 P.2d 1187 (1989). *Dow, supra,* at p. 61-63. *See also State v. Young,* 8 Haw. App. 145, 795 P.2d 285 (1990); Appendix "JJ;" and *State v. Lemalu,* 72 Haw. ___, slip op. at p. 2 (No. 14296, April 11, 1991) at Appendix "KK."

Further, the Hawaii Supreme Court noted that the "judgment of acquittal" was not in compliance with Hawaii Rules of Penal Procedure ("H.R.P.P.") Rule 29, which proscribes the granting of an acquittal of less than the entire offense of DUI. The Supreme Court held as follows:

> Further, it is obvious from the record that the trial court did not intend to dismiss the entire offense since the case was submitted to the jury to consider the second method

> of proof. We find that the trial court did not acquit the defendant of anything. Instead, we conclude that the trial court made a factual finding, equivalent to a jury's special verdict.

*Dow, supra,* at p. 63. Finding no "judgment of acquittal," the Hawaii Supreme Court concluded that "Dow was not twice placed in jeopardy for the same offense when he was retried following a mistrial on the (a)(2) count, despite the trial court's entry of judgment of acquittal on the (a)(1) count." *Dow, supra,* at p. 66.

28 U.S.C. Section 2254(d) states as follows:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, . . . . (Emphasis ours).

Petitioner fails to overcome the correctness of the Hawaii Supreme Court's determination that no "judgment of acquittal" was entered at the time of the Petitioner's first trial. Petitioner's judgment of conviction at the second trial was thus not constitutionally improper under the principles of double jeopardy.

## IV.

## CONCLUSION

Respondent denies that Petitioner's confinement is in violation of the United States Constitution and denies that Petitioner presents any cognizable claim in this Court. Based upon the foregoing argument and authority, it is respectfully requested that the petition be dismissed.

Dated at Honolulu, Hawaii: April 19, 1991.

Respectfully submitted,

STATE OF HAWAII

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\WALLACE W. WEATHERWAX
Deputy Prosecuting Attorney
City and County of Honolulu

Attorneys for Respondents

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**IN THE UNITED STATES DISTRICT COURT**
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| CIRCUIT COURT OF | ) | |
| FIRST CIRCUIT, | ) | |
| et al., | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 1991, one (1) copy of the Answer to Petition for Writ of Habeas Corpus was mailed to Earle A. Partington, Esq. of Partington & Foley, at 1001 Bishop Street, Suite 2450, Honolulu, Hawaii 96813.

\s\WALLACE W. WEATHERWAX
WALLACE W. WEATHERWAX
Deputy Prosecuting Attorney
City and County of Honolulu

**APPENDIX "H"**
**[Appendices "LL" to "MM" motted.]**

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| et al., | ) | OF LAW; |
| | ) | APPENDICES |
| Respondents. | ) | "LL" - "KK" and |
| | ) | CERTIFICATE OF |
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| _____ | ) | |

**SUPPLEMENTAL ANSWER TO**
**PETITION FOR WRIT OF HABEAS CORPUS**

Respondent, CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge and WARREN PRICE, III, Attorney General of Hawaii, (hereinafter collectively referred to as "Respondents"), by Department of the Prosecuting Attorney, City and County of Honolulu, State of Hawaii, supplements its Answer to Petition for Writ of Habeas Corpus (hereinafter "Supplemental Answer") filed on April 19, 1991 and renews its alternative motion to dismiss the Petition for Writ of Habeas Corpus (hereinafter "Petition") filed on March 7, 1991.

In its Answer, Respondents stated its denial as follows:

> denies the '12A. Supporting Facts' (attached sheet at p. 9 of the Petition) insofar as they purport to establish that Petitioner was charged, convicted and sentenced for two separate offenses; or that Petitioner was acquitted of the single offense of DUI, .... (Answer at p. 2).
>
> More specifically, Respondent denies the following characterization in Petitioner's '12A. Supporting Facts:'
>
> 30 Nov. 1987 State trial court files written judgment of acquittal as to Count I (true and correct copy attached as Exhibit B) (Emphasis ours).

Respondents supplement their answer and assert that its denial is not such as to require this Court to hold a factual hearing. Respondents admit that Judge Sasaki entered and filed a document entitled "Judgment of Acquittal" on November 30, 1987 (*see* Appendix II to Answer

and Petition at Exhibit B) but that upon subsequent determination by the Hawaii State Supreme Court Judge Sasaki's action was found to be the equivalent of a factual finding and not a "Judgment of Acquittal." (*See State v. Dow*, 72 Haw. 56, ___ P.2d ___ (1991). (*See* Answer at Appendix "AA").

Respondents further assert that their denial of Petitioner's paragraph 12A. "Supporting Facts" does not require this Court to hold a factual hearing as to the allegations therein and admits to the following:

1. Petitioner was charged in a two-count complaint with one offense of DUI in violation H.R.S. Section 291-4(a) on 23 January 1987. (*See* Petitioner's Exhibit A). Respondents particularly note here that the Hawaii Supreme Court as of that time had not decided whether or not the statute set forth one offense or two separate offenses. (*See Dow, supra*, footnote 5 at p. 7; *State v. Grindles*, 70 Haw. 528, 777 P.2d 1187 (1989)).

2. Petitioner's jury trials were held on 8 June 1987 and 28 February 1989. Respondent's particularly deny that such admission purports to evidence that defendant was twice placed in jeopardy for one offense.

3. Respondents admit that the State offered evidence on direct as to Counts I and II through live witnesses and documentary exhibits (re intoxilyzer result) in the first jury trial. In the second jury trial Petitioner was being retried on Count II alone and similar evidence was offered by Respondent State. Petitioner objected to evidence pertinent to Count I at the second trial but did not raise the issue for review by the State appellate courts as to whether the admission of such evidence at the second trial was harmless error or a denial of Petitioner's due process rights to a fair trial. (*See* Appendix "LL" Petitioner's briefs to the Hawaii Appellate

Courts). Respondents deny that Petitioner has exhausted his State remedies as to this issue.

4. Respondents deny that the Petitioner's supporting facts are such as to constitute double jeopardy under *Grady v. Corbin*, 101 S.Ct. 2084, 109 L.Ed.2d 548, 58 U.S. Law Week 4599 (*see* Appendix "MM").

> Respondents have answered previously as follows:
> Respondent admits Petitioner had exhausted his State remedies only as to the sole factual issue of whether the first trial court "acquitted" Petitioner or not.
> . . .
> Respondent denies that the Petitioner has exhausted his State remedies as to such other issues or any implied "due process" violations.

More specifically Respondents deny that the Hawaii State Courts were afforded the opportunity to address the constitutionality of the DUI statute, H.R.S. Section 291-4(a), as that issue was not directly raised by Petitioner. Respondents specifically deny that the Hawaii State Courts were afforded the opportunity to address whether or not the statutory DUI offense violated the United States Constitution under the principles espoused in *Grady v. Corbin, supra*. Respondents specifically deny that the Hawaii State Courts were afforded the opportunity to address and determine whether or not the use of evidence pertaining to Count I in Petitioner's second trial was a violation of collateral estoppel or res judicata; or merely harmless error without constitutional violation of Petitioner's due process rights to a fair trial.

Petitioner has not specifically raised these issues for determination by the Hawaii State Courts. Petitioner

has post-conviction remedies under Hawaii Rules of Penal Procedure ("H.R.P.P.") Rule 40 still available to him and has not shown this Court why such remedies have not been exhausted. In particular Petitioner fails to explain the "cause" for not raising the issue with the Hawaii State Courts or the "prejudice" of a "miscarriage of justice." Respondents deny that Petitioner's failure to raise the issue is excusable. Petitioner's claim of prejudice if any, is no different than a retrial after a mistrial, and Respondents therefore deny such prejudice which would allow this Court to override the statutory mandate requiring Petitioner to exhaust his state remedies. See 28 U.S.C. 2254(b).

As stated earlier in Respondent's Answer, no transcripts of the Petitioner's first trial were made a part of the record on appeal. Respondents deny that such transcripts are necessary for this Court's determination and any transcription at this stage would place an undue burden upon the State particularly in light of the fact that Petitioner did not feel they were necessary to be designated as part of the record on appeal to the Hawaii State Supreme Court.

WHEREAS, Respondents respectfully pray that the Petition be dismissed for lack of jurisdiction, or, in the alternative, be denied.

Dated at Honolulu, Hawaii: May 2, 1991.

Respectfully submitted,

STATE OF HAWAII

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\WALLACE W. WEATHERWAX
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| | ) | |
| Respondents. | ) | |
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**SUPPLEMENTAL MEMORANDUM OF LAW**

## I.

## INTRODUCTION

Respondents have argued earlier that Dow's petition fails in two material respects:

1. Petitioner fails to satisfy the "in custody" requirements of 28 U.S.C. Section 2254(a) and;

2. Petitioner fails to set forth a constitutional violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

Respondents herein supplement their earlier memorandum and argue that Petitioner fails in establishing a double jeopardy violation where Petitioner has been prejudiced, particularly where Petitioner has failed to present the issues to the Hawaii State Court for determination exhausting his State remedies.

The facts as to the commission of the offense and the trial testimony are summarized in the briefs attached hereto (Petitioner-Appellant Dow's Opening Brief Appendix "LL" at p. 8) and to the Answer (Respondent-Appellee State's Answering Brief Appendix "FF" at p. 6-13; Application for Writ of Certiorari Appendix "EE" at p. 2-6).

In summary, Dow and a companion were investigated by Honolulu Police Officer Mark Nakagawa for trespass in the parking lot of Hawaii School for Girls. At the time he suspected Dow was drinking alcohol. Both were told to leave. Nakagawa left and posted himself a distance away. Dow then drove past Nakagawa and the officer noted the faulty headlight and no front license plate. He stopped defendant for the equipment violations. Considering his earlier suspicions and the indicia of intoxication Nakagawa asked Dow to take the field sobriety test. Dow refused and was arrested. He was

taken to the police station and given the intoxilyzer test which showed a blood alcohol content ("BAC") of .18 percent.

Dow's first jury trial on 8 June 1987 ended in a mistrial as to the proof by way of the BAC (Count II) and an asserted "Judgment of Acquittal" on Count I. At the second trial he was retried on Count II alone. Dow objected to any evidence relating to Count I but the evidence was admitted over objection. Dow asked and the court denied the judgment of acquittal be admitted as evidence. Dow offered no evidence but argued entrapment. He was convicted and a Judgment was entered on February 29, 1989.

On appeal, the Intermediate Court of Appeals ("ICA") reversed finding a double jeopardy violation relying principally upon the *State v. Grindles* decision which came down in July 1989. The ICA recognized the "single offense" nature of the DUI statute as mandated by *Grindles* and thus determined that the judgment of acquittal was therefore an acquittal of the one offense. On writ of certiorari, the Supreme Court reversed the ICA and remanded for determination of other issues. The Supreme Court found that the judgment of acquittal was not a judgment but rather akin to a factual finding as to one of the methods of proof provided by the DUI statute. On remand to the ICA and then to the Circuit Court, Dow's conviction was affirmed.

Petitioner seeks collateral review of that conviction urging that it is a "violation of the protection against double jeopardy." The lack of specificity in the Petitioner's claim of double jeopardy requires Respondent to supplement its answer and memorandum.

## II.

## ARGUMENT

### A. PETITIONER HAS FAILED TO ESTABLISH THAT THIS COURT SHOULD COLLATERALLY REVIEW THE HAWAII STATE COURT'S DECISIONS PERTINENT TO HIS CASE OR THAT HIS RELEASE FROM "CUSTODY" IS WARRANTED.

Respondents have earlier argued that this Court lacks jurisdiction as Petitioner is not in "custody." Further, Respondents have argued that Petitioner has not overcome the presumptively correct determination of the Hawaii State Supreme Court relative to the actions taken by its lower court judges as to whether a "Judgment of Acquittal" was proper and of legal effect so as to bar a subsequent prosecution under double jeopardy principles.

The issue as framed for the Hawaii Supreme Court by Petitioner focused on the "Judgment of Acquittal." Petitioner argued its double jeopardy violation assuming (as did the ICA) that the DUI offense was a "single offense" under *Grindles, supra*. A major point of Petitioner's argument was that the *Grindles* decision made the judgments inconsistent, one of acquittal and one of conviction for the "same offense." Petitioner, it was argued, had been acquitted of the single offense. The Hawaii Supreme Court therefore pronounced that the "Judgment of Acquittal" was not of any legal effect in barring a subsequent prosecution. It thus gave continued validity to the *Grindles* decision that the DUI offense

created by the State legislature was but a "single offense."

On appeal neither Petitioner or Respondent disputed or challenged the constitutionality of the DUI statute. Petitioner assumed it to be a single offense to argue its position of inconsistent judgments. Petitioner assumed it to be two separate offenses for double jeopardy arguing that the judgment of acquittal on one would stand to bar the assumedly second and separate offense. The constitutionality of the DUI statute was never at issue in Petitioner's appeal. It was not even at issue in the *Grindles* case but was declared as being a "single offense" *sua sponte* in what might be characterized as *dicta*.

If the petition here is deemed a challenge to the constitutionality of the Hawaii DUI statute, H.R.S. Section 291-4(a), then Petitioner should be precluded from such having failed to raise the issue directly to the Hawaii courts.

Respondents theorize that Petitioner's claim in this request for collateral review is that the lower court's judgment of acquittal should not and cannot be disputed factually or legally by the Hawaii Supreme Court. In other words the judgment of acquittal must remain valid since the trial court was in effect treating the separate subsections as two separate offenses. One on which the trial court could acquit and the other for submission to the jury.

This argument must be contrasted to Petitioner's earlier alternative and inconsistent argument that it is a single offense for which Petitioner has been acquitted. Here and now, however, Petitioner would argue (inconsistently and collaterally) that the DUI statute is two separate offenses and challenge the *Grindles* decision that they are a single offense. In arguing such, he sets the premise for his double jeopardy claim to attack the

constitutionality of the statute and the *Grindles* decision, both of which were never directly challenged previously in the State courts. Petitioner's focus switches from the judgment of acquittal to the underlying evidence or to the constitutionality of the statute itself.

Petitioner would argue that the evidence for proof of the two separate subsections of the DUI statute are double jeopardy violations relying on *Grady v. Corbin,* 110 S.Ct. 2084, 109 L.Ed.2d 548, 58 U.S. Law Week 4599 (May 1990). (*See* Appendix "MM.) *Grady, supra,* held that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Taken at face value it would first appear that *Grady* does proscribe the second trial. If it is claimed that the evidence presented to Judge Sasaki which underlies his judgment of acquittal on Count I, driving under the influence, is one and the same as presented at the second trial and is an essential element of Count II, driving with a BAC in excess of .10 percent, then *Grady* would prohibit the second trial. Petitioner would argue that this is exactly what took place in the second trial when the State was allowed to put in Count I evidence of indicia of intoxication over his objection. Petitioner did not argue *Grady* or its rationale, *Grady* being decided in May 1990 and the second trial was held in February 1989. Petitioner's objection was premised on the validity of the earlier "Judgment of Acquittal," which in turn assumed that the offenses were separate and could be treated as such by the first trial court, contrary to *Grindles*. Petitioner's argument to the second trial court objecting to the evidence on Count I assumed two separate of-

fenses. He argued that he was only on trial for Count II in the second trial and therefore the Count I evidence was irrelevant.

The second trial court followed *Grindles* and allowed the evidence pertaining to Count I. Consistently, the second trial court disallowed Petitioner's proffer of the judgment of acquittal as evidence.

On appeal, Petitioner did not argue that Judge Sasaki's factual findings in the first trial collaterally estopped the State from relitigating those factual issues in the second trial. Petitioner focused on the second trial court's denial of the judgment of acquittal into evidence. The ICA, heeding the Supreme Court's finding that there was no judgment of acquittal ruled on remand that there was no error in the denial. (*See* Petitioner's Exhibit E).

The question of whether the admission of Count I evidence in the second trial was somehow prejudicial and harmful or was collaterally estopped was not raised on appeal and should be left to the determination of the Hawaii Appellate Courts in construing the Hawaii DUI laws. That is not to say, however, that the double jeopardy aspects should be taken up here on collateral review. It is Respondents' position that those matters should also be left to the Hawaii courts. For example, the constitutionality of the DUI statute as setting forth a "single offense with two methods of proof" should be left with the Hawaii Supreme Court for further development. Our argument hereafter in analyzing *Grady* and the Hawaii DUI statute should be left for further adoption or rejection by that court.

In *Grady, supra*, Justice Brennan speaking for a majority of five Justices, stated as follows:

> Thus, a subsequent prosecution must do more than merely survive the *Blockburger*

> test. As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. (Footnotes omitted).

*Grady, supra* at 58 U.S. LW 4602; *see* Appendix "MM" attached.

Here then, Petitioner would claim and could have claimed at the very outset of the initial prosecution of this case, that the Hawaii DUI statute was violative of double jeopardy and therefore unconstitutional under the *Grady* rationale.[1]

Petitioner would have claimed that the State sought to prove that he was driving under the influence. This is one and the same conduct and therefore the Hawaii statute violates double jeopardy principles if the State is allowed to subject a defendant to a subsequent trial where he was either convicted or acquitted in an earlier trial involving the same conduct. At the outset Respondents would argue that Petitioner was not being subjected to two trials, but rather one and Count II is not

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[1] This, of course, presupposes foresight on the part of counsel as *Grady* was decided in May of 1990 and the initial complaint in this case was filed in January 1987. It also does not consider that the Hawaii Supreme Court decided *Grindles* in July 1989 which makes the DUI statute a single offense or the question of retroactivity of those decisions.

a subsequent prosecution; that the statutory elements provide for proof of different conduct, the driving while under the influence of intoxication or driving with a BAC in excess of .10 percent.

It is highly probable that the Hawaii Supreme Court would have responded as they did in *Grindles*. The Hawaii DUI statute is a single offense with two methods of proof and the legislature intended that only one punishment is called for. It is therefore required that DUI trials consider both methods of proof at one trial and they not be separated, severed or bifurcated.

Justice Scalia, writing for the dissenting minority in *Grady*, would probably disagree that Petitioner sets forth a viable double jeopardy challenge to Hawaii's DUI statute. Scalia would insist that the *Blockburger* test would end the discussion insofar as Hawaii's DUI statute sets forth a separate element under Count II, that is, the proof of the BAC. In *Grady, supra* at 58 U.S. LW 4604, Scalia wrote:

> In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), we summarized the test for determining whether conduct violating two distinct statutory provisions constitutes the "same offense" for double jeopardy purposes:
>
> > "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision required proof of a fact which the other does not. *Gavieres v. United States*, 220

U.S. 338, 342 [(1911)], and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433 [(1871)]: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not except the defendant from prosecution and punishment under the other.'" *Ibid.*

*Blockburger* furnished, we have observed, the "established test" for determining whether successive prosecutions arising out of the same events are for the "same offense." *Brown v. Ohio*, 432 U.S. 161, 166 (1977). This test focuses on the statutory elements of the two crimes with which a defendant has been charged, not on the proof that is offered or relied upon to secure a conviction. "If each [statute] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.' *Ianelli v. United States*, 420 U.S. 770, 785 n. 17 (1975) (citations omitted).

Despite what appears as diverse views between the Brennan majority and the Scalia dissent, all would no doubt concur that the focus of the Double Jeopardy Clause is threefold:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In declaring Hawaii's DUI statute as a "single offense" the Hawaii Supreme Court was giving recognition to all three of those concerns. It was no doubt mindful of these concerns in deciding Petitioner's appeal. In Petitioner's case there was no multiple punishment the second trial judge sentenced Petitioner as though there was but one offense. The Supreme Court was consistent in its application of the single offense concept-Petitioner was being tried for a single offense in the first trial and no judgment of acquittal could be granted to only a part of the case. The allowance of the second trial was a recognition that the mistrial earlier was a mistrial as to a single offense and that therefore the government was entitled to retry the Petitioner upon the jury's failure to return a verdict. *See H.R.S. Section 701-110(4)(b)(iv).* The second jury found Petitioner guilty of the "single offense" of DUI although it primarily determined such through the BAC method of proof. Petitioner was not subjected to multiple trials in violation of the double jeopardy provisions of either the United States Constitution or Hawaii State Constitution. At the outset the State set to try the Petitioner on a single offense using both methods of proof and would have done so had the mistaken

motion and granting of acquittal not been made.

Petitioner was not denied due process and his alleged "custody" is premised on a lawful judgment. The petition should be dismissed as Petitioner fails to show that he has exhausted his State remedies in raising any challenge to the constitutionality of the DUI statute or to errors claimed in the admission of evidence; fails to show that he is in custody such as to give this Court jurisdiction; or that he has been prejudiced by a double jeopardy violation and that his custody is unlawful.

## III.

## CONCLUSION

Based on the foregoing arguments and authority, it is respectfully requested that the petition be dismissed.

Dated at Honolulu, Hawaii: May 3, 1991.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF HAWAII**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | CIVIL NO. 91-00139 |
| | ) | HMF |
| Petitioner, | ) | |
| | ) | CERTIFICATE OF |
| vs. | ) | SERVICE |
| | ) | |
| CIRCUIT COURT OF | ) | |
| FIRST CIRCUIT, | ) | |
| et al., | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 1991, one (1) copy of the Supplemental Answer to Petition for Writ of Habeas Corpus was mailed to Earle A. Partington, Esq., of Partington & Foley, at 1001 Bishop Street, Suite 2450, Honolulu, Hawaii 96813.

\s\WALLACE W. WEATHERWAX
WALLACE W. WEATHERWAX
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## APPENDIX "I"

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Attorney for Petitioner

**IN THE UNITED STATES DISTRICT COURT**
**FOR**
**THE DISTRICT OF HAWAII**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | CIVIL NO. 91-00139-HMF |
| Petitioner, | ) | |
| vs. | ) | PETITIONER'S TRAVERSE AND MEMORANDUM IN SUPPORT OF THE PETITION; DECLARATION OF PAULINE NAMUO; CERTIFICATE OF SERVICE |
| CIRCUIT COURT OF FIRST CIRCUIT, et al., | ) | |
| Respondents. | ) | |
| | ) | Magistrate: Darryl G. Conklin |

**PETITIONER'S TRAVERSE AND MEMORANDUM**
**IN SUPPORT OF PETITION**

I. Introduction

Respondents in their answer filed April 19, 1991, and their Supplemental Answer filed May 3, 1991, deny that Petitioner is "in custody" within the meaning of 28 U.S.C. §2254 and that Petitioner's federal constitutional right against double jeopardy has been violated by the State's retrial of Petitioner for violating H.R.S. §291-4(a), driving under the influence of intoxicating liquor (DUI). All relevant facts alleged by Petitioner were admitted so that the only questions before this court are legal questions.

II. Petitioner is in Custody

Respondents deny that Petitioner is in custody because he was not sentenced to a term of imprisonment for his conviction of DUI. This argument overlooks the fact that Petitioner was sentenced to a fourteen hour minimum alcohol abuse rehabilitation program pursuant to H.R.S. §291-4(b)(1). Attached to this Memorandum is the declaration of Pauline N. Namuo who administers this program in Honolulu. In her declaration, she describes the program which requires that Petitioner be confined in an advisor's office and a classroom for the program. Failure to attend will result in the issuance of a bench warrant.

In examining what constitutes custody for the purposes of habeas corpus, the Supreme Court, in *Jones v. Cunningham*, 371 U.S. 236 (1963), has held that:

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of

"custody" nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.

In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even thought the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. The test used was simply whether she was "at her liberty to go where she please[d]." So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes." Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." And more than a century ago an En-

glish court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind." These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car II c.2 — the forerunner of all habeas corpus acts — as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world. "[H]is movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service. The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of

> their child, one of which we had before us only a few weeks ago. History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus. [Footnotes omitted.] [371 U.S. at 238-240.]
>
> * * *
>
> .... It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. [Footnote omitted.] [371 U.S. at 242-243.]

The fourteen hour minimum alcohol rehabilitation program clearly is a significant physical restraint upon Petitioner's liberty. For those fourteen hours, he is not "at liberty to go where he will," but subject to a restraint not shared by the public generally. *See Hutson v.*

*Justices of Wareham District Court*, 552 F.Supp. 974, 977 (D.Mass. 1982).[1] Further,the fact that Petitioner's sentence is presently stayed does not alter the fact that he is "in custody." *Hensley v. Municipal Court*, 411 U.S. 345 (1973).

Further, it should be noted that DUI in Hawaii is a "serious offense" for which accused has the right to trial by jury. *State v. O'Brien*, 68 Haw. 39, 704 P.2d 883 (1985). Finally, under the Federal Sentencing Guidelines, a DUI conviction, even without a jail sentence, counts toward a higher Criminal History Category and, therefore, an increase in the term of imprisonment for someone cnvicted of a subsequent federal crime. Clearly, Petitioner here is "in custody."

III. Petitioner's Right Not to be Subject to Double Jeopardy

The facts here are simple. It is undisputed that Petitioner was charged in two counts with one offense of DUI in violation of H.R.S. §291-4(a). It is also undisputed that Petitioner was tried twice by jury trial for this one offense; and in both trials the same conduct was in issue and that the same evidence was offered in both trials. However, the complaint charged two counts of DUI in violation of H.R.S. §291-4(a) without it appearing on the face of the complaint, either expressly or impliedly, that the two counts charge but one offense.

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[1] Respondents' suggestion that this fourteen hour minimum alcohol rehabilitation program is analogous to a fine is ludicrous. A fine is a pecuniary punishment. Black's Law Dictionary (4th ed. 1957). The program is anything but pecuniary.

At the end of the State's case at the first trial, the State trial court orally granted Petitioner's oral motion for a judgment of acquittal as to Count I which charged a violation by means of the method of proof set out in H.R.S. §291-4(a)(1). The jury hung as to Count II which charged a violation by means of the method of proof set out in H.R.S. §291-4(a)(2).[2] A mistrial was declared. Five months later and prior to the second jury trial, the first trial judge entered a written judgment of acquittal as to Count I pursuant to Rule 29(a) of the Hawaii Rules of Penal Procedure.[3] Petitioner's subsequent motion to dismiss on double jeopardy grounds was denied, and Petitioner was convicted on Count II at his second jury trial.

The methods of proof under H.R.S. §291-4(a)(1) and (2) are nearly alike. Both require an accused to operate a vehicle, subsection (a)(1) requiring the accused to be under the influence of intoxicating liquor from a subjective standpoint and subsection (a)(2) from an objective standpoint - blood alcohol of 0.10 percent or more. The subjective and objective tests are little more than the opposite sides of the same coin.

On appeal from Petitioners conviction, the Hawaii Intermediate Court of Appeals had no difficulty in holding that the judgment of acquittal triggered the prohibition against double jeopardy barring Petitioner's retrial. 8 Haw. App. ___, 803 P.2d 969 (1990). The Su-

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[2] It is critical to note that the offense of DUI is a violation of H.R.S. §291-4(a), not of §291-4(a)(1) or (a)(2). Subsections (a)(1) and (a)(2) are methods of proof only.

[3] The written judgment of acquittal, being based on the oral judgment of acquittal, was clearly on the merits, having come after the State rested its case in chief in the first jury trial.

preme Court of Hawaii, on certiorari, reversed the Intermediate Court of Appeals holding that as a judgment of acquittal under Rule 29(a) of the Hawaii Rules of Penal Procedure cannot be entered for less than an entire offense and the acquittal was purportedly entered as to only one of the two methods of proof, the judgment of acquittal was a legal nullity and thus there was no double jeopardy. 72 Haw. 56, 806 P.2d 402 (1991).

Under Hawaii law, H.R.S. §291-4(a) is but a single offense provable by two alternative means. *State v. Grindles*, 70 Haw. 528, 531, 777 P.2d 1187, 1190 (1989).[4] Only one judgment, either of acquittal or conviction, may be entered for the offense of violating H.R.S. §291-4(a). *State v. Lemalu*, 72 Haw. ___, ___ P.2 ___ (No. 14292, April 11, 1991), opinion at 9. In Petitioner's case, two judgments, one of acquittal under §291-4(a)(1) and one of conviction under §291-4(a)(2), have been entered.

The Double Jeopardy Clause of the Fifth Amendment, as applicable to the State via the Fourteenth Amendment,[5] provides that no person shall be "subject

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[4] This case made no change in Hawaii law which was somewhat unclear on this point. Not long before *Grindles*, in dicta in two cases decided seven weeks apart, the Supreme Court of Hawaii said that H.R.S. §291-4(a) created two offenses and only one offense. *State v. Wacker*, 70 Haw. 332, 333, 770 P.2d 420, 421 (1989); *Loevsky v. Carter*, 70 Haw. 419, 432, 773 P.2d 1120, 1128 (1989). These conflicting dicta were noted in *Grindles*, 70 Haw. at 530 n.1, 777 P.2d at 1189 n.1.

[5] *See Mayo v. Attorney General*, 528 F.Supp. 833 (D.Haw. 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982), *cert. denied sub nom. Higa v. Mayo*, 461 U.S. 948 (1983). *Mayo* overturned the refusal of the Supreme Court of Hawaii to enforce the federal double jeopardy clause in *State v. Mayo*, 62 Haw. 108, 612 P.2d 107 (1980).

for the same offense to be twice put in jeopardy of life and limb." The Double Jeopardy Clause provides three prong protection against:(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). It is the first prong of this protection which is at issue here.

In applying the Double Jeopardy Clause to this case, two points are critical. The first point is that Petitioner is relying on the written judgment of acquittal entered after the first jury trial pursuant to Rule 29(a) of the Hawaii Rules of Penal Procedure, not the oral judgment of acquittal made during the first jury trial, to trigger the Double Jeopardy Clause. The oral ruling was a finding as to only part of the offense and it is questionable whether such a ruling would trigger double jeopardy. The formal written judgment is another matter entirely.

Secondly, there is no doubt that Petitioner was tried twice for the same conduct. In *Grady v. Corbin*, 110 S. Ct. 2084, 2093 (1990), the Supreme Court held that

> . . . , the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

The instant case is little more than the variation of charging a single offense in multiple counts discussed in *Sanabria v. United States*, 437 U.S. 53 (1978):

> In deciding whether a second trial is permissible here, we must immediately confront the fact that petitioner was acquit-

ted on the indictment. That "'[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution,'" has recently been described as "the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977), quoting *United States v. Ball*, 163 U.S. 662, 671, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896). The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is "based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962); see *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). In *Fong Foo* the Court of Appeals held that the District Court had erred in various rulings and lacked power to direct a verdict of acquittal before the Government rested its case. We accepted the Court of Appeals' holding that the District Court had erred, but nevertheless found that the Double Jeopardy Clause was "violated when the Court of Appeals set aside the judgment of acquittal and directed the petitioners be tried again for the same offense." 369 U.S., at 143, 82 S.Ct., at 672, 7 L.Ed.2d 629. Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the

legal rulings underlying the acquittal were erroneous.

* * *

. . . . The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, "in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction." *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630 39 L.Ed.2d 704 (1895), quoted with approval in *Russell v. United States*, 369 U.S. 749, 764, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962); *Hagner v. United States*, 285 U.S. 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861 (1932).[20]

* * *

While recognizing that only a single violation of the statute is alleged under either theory, the Government nevertheless contends that separate counts would have been proper, and that an acquittal of petitioner on a horse-betting count would not bar another prosecution on a numbers count. . . . . Although there may be circumstances in which this is true, petitioner here was acquitted for insufficient proof of an element of the crime which both such counts would share — that he was "connected with" the single gambling business. . . . . This finding of fact stands as an absolute bar to any further prosecution for

participation in that business.

The Government having charged only a single gambling business, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the "same offense." . . . .

* * *

. . . there is no exception permitting retrial once the defendant has been acquitted, no matter how "egregiously erroneous," *Fong Foo v. United States, supra*, 369 U.S., at 143, 82 S.Ct. at 674, the legal rulings leading to that judgment might be. . . . .

* * *

The Government's real quarrel is with the judgment of acquittal. While the numbers evidence was erroneously excluded, the judgment of acquittal produced thereby is final and unreviewable. Neither 18 U.S.C. §3731 (1976 ed.) nor the Double Jeopardy Clause permits the Government to obtain relief from all of the adverse rulings — most of which result from defense motions — that lead to the termination of a criminal trial in the defendant's favor. See *United States v. Wilson, supra*, 420 U.S., at 351-352, 95 S.Ct. at 1025-1026; S.Rep.No. 91-1296, p.2 (1970). To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a mistrial motion leads to an acquittal

> would undercut the adversary assumption on which our system of criminal justice rests, see *Jeffers v. United States, supra*, 432 U.S., at 159-160, 97 S.Ct. at 2209 (STEVENS, J. dissenting in part and concurring in judgment in part), and would vitiate one of the fundamental rights established by the Fifth Amendment. [All but one footnote omitted.] [437 U.S. at 64-78.]

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[20] The Court of Appeals erred in its apparent view that the Government should have drawn the indictment in two counts because the single count was duplicitous. 548 F.2d, at 5 n.4. Only a single gambling business was alleged and hence only a single offense. . . . . A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged. . . . .

In *State v. Dow*, the Supreme Court of Hawaii vitiated the Double Jeopardy Clause by holding that a judgment of acquittal entered erroneously because a mistake in law is a legal nullity. This position was expressly rejected in *Sanabria*. It is irrelevant that the judgment of acquittal was entered as a result of a legal error. If the holding of the Supreme Court of Hawaii is upheld, the protection afforded by the Double Jeopardy Clause can easily be evaded by a court merely declaring a prior acquittal to be a legal nullity. Nor is it any consolation that the single offense of DUI was charged in two counts. Those two counts shared at least, one common element — operating a vehicle. The acquittal on Count I is an acquittal as to this element in Count II. Finally, the State is no position to complaint about what happened here.

Under H.R.S. §806-30,[6] the State could have charged this DUI offense in one count. Having chosen to charge under archaic common law forms, the State took the risk of what happened here.[7]

The instant case is also strikingly similar to *United States v. Baptiste,* 832 F.2d 1173 (9th Cir.1987), a federal DUI case from this court in which a dismissal by the magistrate after the government rested which was

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[6] H.R.S. §806-30 provides:

> §806-30 Alternative allegations. In an indictment for an offense which is constituted of one or more of several acts or which may be committed by one or more of several means or with one or more of several intents, or which may produce one or more of several results, two or more of those acts, means, intents, or results may be charged in the alternative.

[7] It was recognized at common law that one offense could be charged in more than one count to meet contingencies of proof at trial. *People v. Connor,* 17 Cal. 354, 360 (1861); *People v. Thompson,* 28 Cal. 215 (1865). See 2 C. Torcia, Wharton's Criminal Procedure, §296 at 140 (12th Ed.1975). The common law applies in Hawaii. H.R.S. §1-1. And in *State v. Lemalu,* 72 Haw. ___, ___, ___ P.2d ___, ___ (1991), opinion at 3-4, the Supreme Court of Hawaii recognized this common law rule and held it applicable to charging the two methods of proof under H.R.S. §291-4(a). However, where one offense is charged in multiple counts, it is necessary that it show clearly on the face of the charge that the matters set forth in the different counts are descriptive of one and the same offense. *People v. Garcia,* 58 Cal. 102 (1881); *People v. Degnen,* 70 Cal.App. 567, 572-573, 234 P. 129, 131-132 (1925). Such description need not be express so long as it is manifest. *People v. Craig,* 17 Cal.2d 453, 456, 110 P.2d 403, 404 (1941). As noted, the complaint in *State v. Dow* failed to indicate that one offense was charged. The State cannot now complain that this defect bars it from denying Double Jeopardy.

legally erroneously was held to bar retrial under the Double Jeopardy Clause. The instant Petition must be granted.

DATED: Honolulu, Hawaii, May 9, 1991.

/s/Earle A. Partington
Attorney for Petitioner

EARLE A. PARTINGTON
Partington & Foley
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: 526-9500

Attorney for Petitioner

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF HAWAII**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | CIVIL NO. 91-00139-HMF |
| Petitioner, | ) | |
| | ) | DECLARATION OF PAULINE N. NAMUO |
| vs. | ) | |
| | ) | |
| CIRCUIT COURT OF FIRST CIRCUIT, et al., | ) | |
| Respondents. | ) | |

**DECLARATION OF PAULINE N. NAMUO**

Pauline N. Namuo, pursuant to 28 U.S.C. §1746, declares:

1. I am the Driver Education Administrator for the District Court of the First Circuit, State of Hawaii.

2. I am charged with administering the fourteen hour minimum alcohol abuse rehabilitation program mandated as part of the sentence imposed upon those persons convicted in the First Circuit of driving under the influence of intoxicating liquor (DUI) pursuant to H.R.S. §291-4(b)(1).

3. One and one half hours of this program consists of a meeting with a Driver Improvement Advisor in the Advisor's office at the District Court of the First Circuit.

4. The remainder of the fourteen hour minimum program consists of attendance at classes at the District Court of the First Circuit held either over a three day period or a five day period.

5. The three day program is held over three consecutive days from 8:00 a.m. to 12:30 p.m. the first day and from 8:00 a.m. to 12:00 noon the next two days.

6. Military personnel are permitted to attend the equivalent military program which is longer than 14 hours and in some cases longer more specialized programs are devised.

7. Regardless of which programs is utilized, the convicted person must physically attend both the initial session with the counsel and the classroom portion of the instruction or my office will report the person to the court for noncompliance and a bench warrant will issue on the ground that the person is in contempt.

8. Physical attendance means that the person must actually be in the Advisor's office at the District Court during the interview and be in the classroom during the twelve and one half hour classroom program.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON: April 30, 1991, Honolulu, Hawaii.

/s/ Pauline N. Namuo

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was duly served by hand-delivery upon the following on May 9, 1991.

Prosecuting Attorney
Attn: Appellate Section
1164 Bishop Street
Honolulu, Hawaii 96813

Attorney for Respondents
STATE OF HAWAII

/s/ EARLE A. PARTINGTON

## APPENDIX "J"

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF HAWAII**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | Civil No. 91-00139 |
| | ) | HMF |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, et al. | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**ORDER DISMISSING PETITION FOR HABEAS CORPUS RELIEF**

**INTRODUCTION**

On March 7, 1991, Dwight O. Dow filed a petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody. On March 19, 1991, Magistrate Judge Daral Conklin executed an order to show cause pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, and thereby required that the respondents file an answer to the petition. On April 19, 1991, respondents filed such an answer. Respondents also filed a Supplemental Answer on May 3, 1991. Finally, on May 9, 1991, petitioner filed a Traverse and Memorandum in Support of Petition.

## BACKGROUND

On February 29, 1989, petitioner was convicted of one count of driving under the influence, and acquitted of a second count. As a result, petitioner was given the following sentence: a fine of $250, driver's license suspension for 90 days, and 14 hours of alcohol rehabilitation class. Petitioner appealed his conviction to the Hawaii Intermediate Court of Appeal claiming a violation of the double jeopardy clause. The Intermediate Court of Appeal reversed petitioner's conviction on this ground. This ruling was appealed to the Hawaii Supreme Court, and the Hawaii Supreme Court reversed the Intermediate Court of Appeal's double jeopardy ruling. The case was remanded back to the Intermediate Court of Appeal, which then affirmed petitioner's conviction.

Following this exhaustion of state appeals, petitioner filed the instant motion for habeas corpus relief in federal court, claiming that the state had violated the double jeopardy clause in obtaining his conviction. Because the court finds that it lacks jurisdiction to hear this petition, the court does not reach the merits of petitioner's claim.

## DISCUSSION

Section 2254 provides that

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corps in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). Accordingly, this court only has jurisdiction to consider petitions by individuals who are actually "in custody" within the meaning of this statute.

Petitioner has not been sentenced to any jail time. He has, however, been required to pay a $250 fine, to attend 14 hours of alcohol rehabilitation classes, to have his license suspended for 90 days. It is clear in this circuit, that the mere imposition of a fine, backed up by the threat of incarceration for non-payment, is not "custody" within the meaning of section 2254. *See Dremann v. Francis*, 828 F.2d 6 (9th Cir. 1987) (no habeas relief available for attorney who was fined $500 for contempt of court and sentenced to jail for the lesser of three days or until he paid his fine).

Two other circuits have addressed the issue of drivers license suspensions, both finding that suspensions of up to one year do not amount to "custody" within the meaning of section 2254. *See Harts v. State of Indiana*, 732 F.2d 95 (7th Cir. 1984) (one year drivers license suspension not "custody" under § 2254); *Westberry v. Keith*, 434 F.2d 623, 524-25 (5th Cir. 1970) ($250 fine and one year license revocation not custody within meaning of 28 U.S.C. § 2254); see also *Whorley v. Brilhart*, 359 F. Supp. 539, 541-42 (E.D. Va. 1973) (ten year license revocation not custody).

Petitioner argues, however, that he is in custody because he was sentenced to a fourteen hour alcohol abuse rehabilitation program. Under this program, petitioner would be required to attend a one and one-half hour meeting with a Driver Improvement Advisor in the Advisor's office at the District Court of the First Circuit. Following this meeting, he would spend the remainder of the time attending classes at the District Court of the First Circuit. These classes would be held over either a

three or five day period. Declaration of Pauline N. Namuo, pars. 3-4.

The three day program is held over three consecutive days — from 8:00 a.m. to 12:30 p.m. on the first day and from 8:00 a.m. to 12:00 noon on the next two days. *Id.* par. 5. The court was not informed of the scheduling of the 5 day class, but it would, presumably, be approximately 2 1/2 hours per day over a five day period. Petitioner would be required to physically attend all class periods or face the issuance of a bench warrant.

The question presented to this court is whether this mandatory class attendance constitutes "custody" within the meaning of section 2254. The Supreme Court has held that conditions which "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do . . . are enough to invoke [habeas corpus]. *Jones v. Cunningham*, 371 U.S. 236 at 243. However, as pointed out by the Court of Appeals for the Seventh Circuit in *Harts*, "[n]ot every restraint on liberty . . . is significant enough to meet this test." 732 F.2d at 96.

Although attending alcohol rehabilitation classes does entail certain restrictions on personal liberty, the court notes the significant qualitative differences between attending such classes and incarceration. Unlike mandatory incarceration, petitioner is only required to attend the class for a few hours each day. In addition, petitioner has a fair amount of control over the scheduling of the classes — for example, he may opt for the 3 day program or the 5 day program, and presumably has some say as to which week he will attend the classes. In sum, petitioner's freedom remains substantially undiminished as he may, in effect, come and go as he pleases, so long as he does, at some point, attend one of the programs. In

addition, the court notes that the short duration of the classes, a few hours each day for less than a week, mitigates against a finding that petitioner's liberty interests are significantly infringed.

The court finds that the mandatory class attendance for a few hours each day over a period of three or five days, is insufficient to constitute the kind of "'severe restraint [ ] on individual liberty' for which habeas corpus relief is reserved." *Harts v. State of Indiana*, 732 F.2d at 97 (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 353 (1973)).

Because petitioner is not "in custody" within the meaning of section 2254, he is not entitled to invoke the federal habeas corpus jurisdiction. Accordingly, the petition for habeas corpus relief is DISMISSED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Dec. 13, 1991.

/s/HAROLD M. FONG
United States District Judge

DWIGHT O. DOW v. CIRCUIT COURT OF THE FIRST CIRCUIT, et al.;
Civil No. 91-00139 HMF; ORDER DISMISSING PETITION FOR HABEAS CORPUS RELIEF

## APPENDIX "K"

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | NO. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC # Civil 91-00139-HMF Hawaii |
| vs. | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, | ) | |
| Respondents-Appellees. | ) | |

**PETITIONER-APPELLANT'S OPENING BRIEF**

**and**

**CERTIFICATE OF SERVICE**

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Attorney for Petitioner-Appellant

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | NO. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC # Civil 91-00139-HMF Hawaii |
| vs. | ) | |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, | ) | |
| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

**PETITIONER-APPELLANT'S**

**OPENING BRIEF**

I. STATEMENT OF JURISDICTION

The jurisdiction of the district court was based 28 U.S.C. §§ 2241 and 2254. The jurisdiction of this Court is based on 28 U.S.C. §§ 1291 and 1294(1). The "Order Dismissing Petition for Habeas Corpus Relief" was filed

in the district court on December 13, 1991 (R. 8, E.R. 274) The Judgment below was filed on December 18, 1991 (R. 9, E.R. 279), and is properly appealable because it disposed of all claims of all the parties. The district court filed a "Certificate of Probable Cause for Appeal"on December 18, 1991, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure (R. 10). The Notice of Appeal was timely filed on December 23, 1991, pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure (R. 11, E.R. 280). Petitioner-Appellant Dwight O. Dow (hereinafter "Dow") is presently still on bail pending appeal set by the Circuit Court of the First Circuit, State of Hawaii, pending execution of his sentence by that court, which was stayed pending his state appeal.

## II. STANDARD OF REVIEW

The court of appeals reviews the denial of a petition for writ of habeas corpus *de novo*. *Tamapua v. Shimoda*, 796 F.2d261, 262 n.l (9th Cir. 1986).

## III. STATEMENT OF ISSUE PRESENTED

A. Whether the district court erred in holding that Dow's sentence of, *inter alia*, a fourteen hour alcohol abuse rehabilitation program for his conviction of driving under the influence of intoxicating liquor is not a significant restraint on liberty so as to place Dow "in custody" as required to invoke federal habeas corpus jurisdiction under 28 U.S.C. § 2254?

## IV. STATEMENT OF THE CASE

The underlying facts of the case are undisputed.[1] Dow was charged in the Circuit Court of the First Circuit, State of Hawaii, by complaint with Driving Under the Influence of Intoxicating Liquor (DUI) in violation of H.R.S. § 291-4(a)(R. 1, E.R. 9, at Ex. A). The two counts were intended by the State of Hawaii to allege one offense committed in either of the two methods of proof set out in H.R.S. § 291-4(a)(1) and(a) (2).[2] Dow was tried twice by jury trial for this one offense; in both trials the same conduct was in issue and the same evidence was offered. However, the complaint charged the two counts of DUI without it appearing on the face of the complaint, either expressly or impliedly, that the two counts charged but one offense.

At the end of the State's case at the first jury trial, the state trial court orally granted Dow's oral motion for

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[1] The facts were set out in the Petition (R. 1, E.R. 1) and admitted in the Answer (R. 5, E.R. 2 5 ) and the Supplemental Answer R. 6, E.R. 182). The facts are also set out in the Order Dismissing the Petition (R. 8, E.R. 274). The facts have never been in dispute.

[2] Under Hawaii law, H.R.S. § 291-4(a) is but a single offense with two alternative means of proof. *State v. Grindles*, 70 Haw.528, 531,777 P.2d 1187, 1190 (1989). Only one judgment, either of acquittal or conviction, may be entered for the offense, of violating H.R.S. § 291-4(a). *State v. Lemalu*, 72 Haw. 130, 139, 809 P.2 442, 447 (1991). In Dow's case, two judgments (one of acquittal under § 291-4(a)(1) and one of conviction under § 291-4(a)(2)) were entered. It should be noted that DUI in Hawaii is a "serious offense" for which an accused has the right to trial by jury. *State v. O'Brien*, 68 Haw. 39,704 P.2d 883 (1985); *State v. Jordan*, 72 Haw. 597,____ P.2d .____ (1992).

a judgment of acquittal as to Count I, which charged a violation by means of the method of proof set out in H.R.S. § 291-4(a)(1)(R. 1, E.R. 11, at Ex. B). The jury hung as to Count II, which charged a violation by means of the method of proof set out in H.R.S. § 291-4(a)(2). A mistrial was declared as to Count II. Five months later and prior to the second jury trial, the first trial judge entered a written judgment of acquittal as to Count I pursuant to Rule 29(a) of the Hawaii Rules of Penal Procedure.[3] Dow's subsequent motion prior to his second jury trial to dismiss on double jeopardy grounds was denied, and Dow was convicted onCount II at his second jury trial (R. 1, E.R. 12, at Ex. C) Dow was sentenced to a fine of $250.00, a license suspension of 90 days, and a fourteen hour alcohol abuse rehabilitation program. This program consists of a one and one-half hour meeting with a driver improvement advisor in the advisor's office and twelve and one-half hours of classroom attendance. Attendance at the entire fourteen hour program is mandatory. Failure to attend results in the issuance of a bench warrant for contempt of court (R. 7, Declaration of Pauline N. Namuo). On appeal from Dow's conviction, the Hawaii Intermediate Court of Appeals held that the judgment of acquittal following Dow's first jury trial triggered the prohibition against double jeopardy and barred Dow's retrial. *State v. Dow*, 8 Haw. App. 372, 803 P.2d 969 (1990). The Supreme Court of Hawaii, on certiorari, reversed the Intermediate Court of Appeals, holding that as a judgment of acquittal under Rule 29(a) of the Hawaii

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[3] The written judgment of acquittal, being based on the oral judgment of acquittal, was clearly on the merits, as it came after the State rested its case-in-chief in the first jury trial.

Rules of Penal Procedure cannot be entered for less than an entire offense and that as the acquittal was purportedly entered as to only one of the two methods of proof, the judgment of acquittal was a legal nullity and thus there was no double jeopardy under the Fifth Amendment. *State v. Dow*, 72 Haw. 56, 806 P.2d 402 (1991).

Dow then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the district court. The district court dismissed the petition, holding:

> Although attending alcohol rehabilitation classes does entail certain restrictions on personal liberty, the court notes the significant qualitative differences between attending such classes and incarceration. Unlike mandatory incarceration, petitioner is only required to attend the class for a few hours each day. In addition, petitioner has a fair amount of control over the scheduling of the classes — for example, he may opt for the 3 day program or the 5 day program, and presumably has some say as to which week he will attend the classes. In sum, petitioner's freedom remains substantially undiminished as he may, in effect, come and go as he pleases, so long as he does, at some point, attend one of the programs. In addition, the court notes that the short duration of the classes, a few hours each day for less than a week, mitigates against a finding that petitioner's liberty interests are significantly infringed.
>
> The court finds that the mandatory class attendance for a few hours each day

> over a period of three or five days, is insufficient to constitute the kind of "'severe restraint[ ] on individual liberty' for which habeas corpus relief is reserved." *Harts v. State of Indiana*, 732 F.2d at 97 (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 353 (1973)).

Order Dismissing Petition for Habeas Corpus Relief at 4-5 (R. 8,E.R. 277-78).

This appeal resulted.

## V. ARGUMENT

### A. THE DISTRICT COURT ERRED IN HOLDING THAT DOW'S SENTENCE OF, INTER ALIA, A FOURTEEN HOUR ALCOHOL ABUSE REHABILITATION PROGRAM FOR HIS CONVICTION OF DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR IS NOT A SIGNIFICANT RESTRAINT ON LIBERTY SO AS TO PLACE DOW "IN CUSTODY" AS REQUIRED TO INVOKE FEDERAL HABEAS CORPUS JURISDICTION UNDER 28 U.S.C. § 2254.

In examining what constitutes being "in custody" for the purposes of complying with the jurisdictional prerequisite for habeas corpus, the Supreme Court, in *Jones v. Cunningham*, 371 U.S. 236 (1963), held that:

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of

"custody" nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.

In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even thought the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. The test used was simply whether she was "at her liberty to go where she please[d]." So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes." Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." And more than a century ago an En-

glish court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind." These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car II c.2 — the forerunner of all habeas corpus acts — as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world. "[H]is movements," this Court said, "are restrained by authority of the Untied States, and he may by habeas corpus test the validity of his exclusion." Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service. The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the

fit and proper person to have custody of their child, one of which we had before us only a few weeks ago. History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus. [Footnotes omitted.] [371 U.S. at 238-240.]

* * *

It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. [Footnote omitted.] [371 U.S. at 242-243].

And in *Hensley v. Municipal Court*, 411 U.S. 345 (1973), in which a defendant in a criminal case had been released on his own recognizance pending execution of his

sentence of a year in jail, the Court stated that:

> "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. [286] at 291, 89 S. Ct. [1082] at 1086.
>
> Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. . . . That same theme has indelibly marked our construction of the statute's custody requirement.
>
> [W]e can only conclude that petitioner is in custody for purposes of the habeas corpus statute. First, he is subject to restraints "not shared by the public generally". . . . He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers. . . .
>
> Second, petitioner remains at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court. Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his "custody" for purposes of a habeas corpus action. [Citation

> omitted.] Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim. [411 U.S. at 350-353.]

*See also Whorley v. Brilhart*, 359 F. Supp. 539, 541-542 (E.D. Va.1973); *Pueschel v. Leuba*, 383 F. Supp. 576, 579 (D. Conn. 1974).

This is not the "fine only" situation where no conditions or restraints on a person's liberty were imposed for which habeas corpus will not lie. See *Dremann v. Francis*, 828F.2d 6 (9th Cir. 1987). The fourteen hour alcohol abuse rehabilitation program is in addition to the $250.00 fine imposed upon Dow, and the program is fourteen hours of actual restraint, albeit in increments. This restraint is not one shared by the public generally; and during this fourteen hours Dow cannot come and go as he pleases, as his freedom of movement rests in the hands of state judicial officials. And fourteen hours incarceration in an office or classroom is eighty-six hours time as long as the ten minutes incarceration in jail apparently found to be enough by the Supreme Court in *Hensley* to give the federal courts the power to hear his constitutional claim. *See Hensley*, 411 U.S. at 353.

No one would dispute that fourteen hours incarceration in jail would be a significant physical restraint on a person's liberty. How is fourteen hours incarceration in an office or classroom any less significant when the person incarcerated has no desire to be incarcerated anywhere. A jail is not determined by what it is called, but by what it does. If Dow is not free to go as free persons are free to go, he is effectively in jail. Calling that

jail a classroom does not alter the reality. The district court's finding of no significant restraint elevates form over substance and prevents the Great Writ from performing its basic function of freeing persons subject to actual unlawful physical restraint. It would be illogical if the persons described in *Jones v. Cunninqham* as having the benefit of the writ although not actually under physical restraint, but Dow who has been sentenced to actual physical restraint is denied the protection of the writ.

Since *Jones v. Cunningham*, the English courts have dealt with this issue. In *Ex parte Mwenya*, [1960] 1 Q.B. 241,[1959] 3 All E.R. 525, the applicant had been subject to an order of the government of the British Protectorate of Northern Rhodesia (now the Republic of Zambia) restricting him within an area that was somewhat greater than l,500 square miles in size. Within that area, the applicant was not subject to anything in the nature of detention or limitation of his movements. [1960] 1 Q.B. at 288-89. The applicant sought a writ of habeas corpus in England before the Queen's Bench Division (directed to the Secretary of State for the Colonies and other officials) claiming wrongful detention. The writ of habeas corpus did issue although the case was not decided on the basis of whether the applicant's restriction constituted a detention as would permit habeas corpus, the parties having assumed that the detention was sufficient. [1960] 1 Q.B. at 290, [1959] 3 All E.R. at 528. Obviously, the writ would not have issued if the court had thought that there was no detention.

In *Ghani v. Jones*, [1970] 1 Q.B.693, [1969] 3 All E.R. 1700, in which a mandamus application was directed to thepolice to compel the return of confiscated passports, the Master of Rolls, Lord Denning, stated that

"[a] man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest of grounds." [4] [1970] 1 Q.B. at 709, [1969] 3 All E.R. at 1706. The court upheld the lower court's order to return the passports. There appears little doubt that, in view of Lord Denning's language, habeas corpus would have been an alternative vehicle of review in this case.

It is not just the law of England to which this courtmay look for guidance. In *Guzzardi v. Italy*, 3 E.H.R.R. 333 (1980), the European Court of Human Rights had to decide if a mafioso who was placed on a special restriction (i.e. compulsory residence) effectively confining him, with some exception, to an area of 2.5 square kilometers on a small island off the coast of Sardinia had been deprived of his liberty or was subject to only a restriction of his liberty. Article 5(1) of the European Convention on Human Rights, to which Italy is a signatory, prohibits deprivations of liberty without due process of law, but mere restrictions on liberty of movement are governed by a protocol to the Convention, to which Italy is not a signatory. 3 E.H.R.R. at 362

The principal factors the court considered in deciding this issue were:

> [T]he extremely small size of the area where he was confined, the almost permanent supervision to which he was

---

[4] Under H.R.S. § 1-1, the common law of England forms the common law of Hawaii.

> subject, the all but complete impossibility for him to make social contacts and the length of his enforced stay. . . . [3 E.H.R.R. at 362.[5]]

The European Court found a deprivation of liberty, not merely a restriction of movement. *See also Ciulla v. Italy*, 13 E.H.R.R.346 (1989); *Tyrer v. United Kingdom*, 2 E.H.R.R. 1, 10 (1978); *Enqel v. the Netherlands*, 1 E.H.R.R. 647, 669 (1976).

If Guzzardi's special restriction is a deprivation of liberty, then Dow's incarceration in the fourteen hour alcohol abuse rehabilitation program is a significant restraint on liberty under notions prevailing in democratic states. It is inconceivable that the Great Writ affords fewer protections that Article 5(1) of the European Convention on Human Rights. The English cases fully support this view. This would seem especially true if ten minutes incarceration in jail constitutes a significant restraint on liberty. The district court's view that the division of the fourteen hour program into separate sessions of a few hours each somehow makes Dow's incarceration less significant than if it were one continuous fourteen hour session is like saying someone sentenced to forty-eight hours in jail, who is only required to serve the sentence three or four hours at a time, is not under significant restraint.

---

[5] His length of stay was sixteen months. 3 E.H.R.R. at 364 saying that someone sentenced to forty-eight hours in jail, who is only required to serve the sentence three or four hours at a time, is not under significant restraint.

Except in time of war or revolution, the loss of freedom comes incrementally within human society, often without the citizens even realizing that they are losing their freedom. Fascist Italy after 1922 and Nazi Germany after 1933 are the most notorious examples of our century. The Great Writ is one of the bulwarks of Anglo-American freedoms. The holding of the district court below is nothing less than the first increment of an assault upon the protection of the Great Writ. The district court's holding may not be permitted to stand.

VI. CONCLUSION

The judgment of the district court must be reversed,and the case remanded for a decision on Dow's double jeopardy claim.

DATED: Honolulu, Hawaii, April 9, 1992.

\s\EARLE A. PARTINGTON
EARLE A. PARTINGTON
Attorney for Petitioner-Appellant

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | NO. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC # Civil 91-00139-HMF Hawaii |
| | ) | |
| vs. | ) | |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, | ) | |
| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

## STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Petitioner-Appellant Dwight O. Dow, through his undersigned attorney, hereby certifies that he is unaware of any pending cases related to this one.

DATED: Honolulu, Hawaii, April 9, 1992.

\s\EARLE A. PARTINGTON
EARLE A. PARTINGTON
Attorney for Petitioner-Appellant

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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|---|---|---|
| DWIGHT O. DOW, | ) | NO. 92-15128 |
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| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused two copies of Petitioner-Appellant's Opening Brief and one copy of the Excerpts of Record to be duly served by hand delivery upon the following:

PROSECUTING ATTORNEY
Attn: Appellate Section
1164 Bishop Street
Honolulu, Hawaii 96813
Attorney for Respondents-Appellee

DATED: Honolulu, Hawaii, April 9, 1992.

\s\EARLE A. PARTINGTON
EARLE A. PARTINGTON
Attorney for Petitioner-Appellant

**APPENDIX "L"**
**[Addendum "A" omitted.]**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | NO.92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC# Civil 91-00139-HMF Hawaii |
| | ) | |
| vs. | ) | (Honolulu) |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the HONORABLE WENDELL K. HUDDY, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, | ) | |
| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

**APPELLEES' ANSWERING BRIEF**

**ADDENDUM "A"**

**and**

**CERTIFICATE OF SERVICE**

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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|---|---|---|
| DWIGHT O. DOW, | ) | NO.92-15128 |
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| Petitioner-Appellant, | ) | DC# Civil 91-00139-HMF Hawaii (Honolulu) |
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| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

**APPELLEES' ANSWERING BRIEF**

**I.**

**STATEMENT OF JURISDICTION**

Jurisdiction of this Court lies in 28 U.S.C. Sections 1291 and 2253 insofar as a "Judgment in a Civil Case," finally disposing of all issues before the court below, was

filed on December 18, 1991 (R. 9, E.R. 279); a "Certificate of Probable Cause" under Rule 22(b) of the Federal Rules of Appellate Procedure ("F.R.A.P." filed December 18, 1991 (R. 10); and the Notice of Appeal was timely filed on December 23, 1991 per F.R.A.P. Rule 4(a) (R. 11, E.R. 280).[1]

## II.

## STANDARD OF REVIEW

As a general rule, the same standards that guide federal appellate courts in direct review are applicable to review of the holdings of the federal district court on appeal from a habeas decision. That is, the factual conclusions of the fact finder below get clearly erroneous review, mixed questions receive generally independent review, and purely legal issues receive *de novo* review. 2 S. Childress & M. Davis, Federal Standards of Review, Sec. 13.06 at 13-42 (2d ed. 1992) (hereinafter "Federal Standards of Review"), citing *Neuschafer v. Whitley*, 816 F.2d 1390, 1393 (9th Cir. 1987).

## III.

## STATEMENT OF ISSUE PRESENTED

WHERE PETITIONER'S EVIDENCE TO ESTABLISH HABEAS CORPUS "IN CUSTODY" JURISDICTIONAL

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[1] Respondents note that Petitioner's Statement of Jurisdiction (Opening Brief (O.B.) at P. 1) seemingly asserts that the District Court of Hawaii based jurisdiction on 28 U.S.C. Section 2254.

PREREQUISITE (28 U.S.C. Section 2254(a)) CONSISTS OF DECLARATION OF ADMINISTRATOR OF ALCOHOL REHABILITATION PROGRAM SETTING FORTH REQUIREMENT OF ACTUAL PHYSICAL PRESENCE IN A CLASSROOM DURING THE FOURTEEN HOUR PROGRAM SPREAD OVER AN OPTIONAL THREE OR FIVE DAY PERIOD IS THE DISTRICT COURT'S HOLDING THAT THERE IS INSIGNIFICANT RESTRAINT OF LIBERTY TO FIND PETITIONER "IN CUSTODY" TO WARRANT HABEAS CORPUS RELIEF CLEARLY ERRONEOUS?

## IV.

## STATEMENT OF THE CASE

On March 7, 1991, Petitioner filed his petition under 28 U.S.C. Section 2254 for writ of habeas corpus by a person in state custody (E.R.1-24). Upon the issuance of an Order to Show Cause dated March 19, 1991, Respondents filed an answer and supplemental answer and memoranda, respectively on April 19 and May 3, 1991 (E.R. 25-181). On May 9, 1991 Petitioner filed a Traverse and Memorandum in support of Petition; Declaration of Pauline Namuo.[2]

On December 13, 1991 the District Court dismissed the Petition (E.R. 274-278) and Judgement was entered on December 18, 1991 (E.R. 279). The District Court dismissed the petition finding it did not have ju-

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[2] Insofar as Respondent's copy of the Excerpts of the Record does not include Petitioner's Traverse and Memorandum in Support of Petition; and Declaration of Pauline Namuo, Respondent's attach same here as an Addendum to its Answering Brief.

risdiction under the "in custody" requirement of 28 U.S.C. Section 2254. In its written order of dismissal the District Court set forth the background of the case:

> On February 29, 1989, petitioner was convicted of one count of driving under the influence, and acquitted of a second count. As a result, petitioner was given the following sentence: a fine of $250, driver's license suspension for 90 days, and 14 hours of alcohol rehabilitation class. Petitioner appealed his conviction to the Hawaii Intermediate Court of Appeal claiming a violation of the double jeopardy clause. The Intermediate Court of Appeal reversed petitioner's conviction on this ground. This ruling was appealed to the Hawaii Supreme Court, and the Hawaii Supreme Court reversed the Intermediate Court of Appeal's double jeopardy ruling. The case was remanded back to the Intermediate Court of Appeal, which then affirmed petitioner's conviction.
>
> Following this exhaustion of state appeals, petitioner filed the instant motion for habeas corpus relief in federal court, claiming that the state had violated the double jeopardy clause in obtaining his conviction. Because the court finds that it lacks jurisdiction to hear this petition, the court does not reach the merits of petitioner's claim.

As the basis for its determination dismissing the petition the court made the following findings:

1. "Petitioner has not been sentenced to any jail time."
2. "He has, . . . been required to pay a $250 fine, to attend 14 hours of alcohol rehabilitation classes, to have his license suspended for 90 days."
3. "Petition argues, however, that he is in custody because he was sentenced to a fourteen hour alcohol abuse rehabilitation program."
4. "Under this program, petitioner would be required to attend a one and one-half hour meeting with a Driver Improvement Advisor in the Advisor's office at the District Court of the First Circuit. Following this meeting, he would spend the remainder of the time attending classes at the District Court of the First Circuit. These classes would be held over either a tree or five day period. Declaration of Pauline N. Namuo, pars. 3-4."
5. "The three day program is held over three consecutive days—from 8:00 a.m. to 12:30 p.m.on the first day and from 8:00 a.m. to 12:00 noon on the next two days. *Id.* par. 5. The court was not informed of the scheduling of the 5 day class but it would, presumably, be approximately 2 1/2 hours per day over a five day period. Petitioner would be required to physically attend all class periods or face the issuance of a bench warrant."
6. "Although attending alcohol rehabilitation classes does entail certain restrictions on personal liberty, the court notes the significant qualitative differences between attending such classes and incarceration.

Unlike mandatory incarceration, petitioner is only required to attend the class for a few hours each day. In addition, petitioner has a fair amount of control over the scheduling of the classes — for example, he may opt for the 3 day program or the 5 day program, and presumably has some say as to which week he will attend the classes.

7. "In sum, petitioner's freedom remains substantially undiminished as he may, in effect come and go as he pleases, so long as he does, at some point, attend one of the programs.

8. "In addition, the court notes that the short duration of the classes, a few hours each day for less than a week, mitigates against a finding that petitioner's liberty interests are significantly infringed.

Petitioner appeals the District Court findings asking that this Court find such to be clearly erroneous arguing that the requirement of actual physical presence in the classroom is equal to being in jail. O.B. at 9.

## V.

## ARGUMENT

### A. THE DISTRICT COURT CORRECTLY DETERMINED THAT PETITIONER FAILED TO ESTABLISH THAT HE WAS "IN CUSTODY" SO AS TO GIVE THE COURT HABEAS CORPUS JURISDICTION UNDER 28 U.S.C. SECTION 2254(a).

**1. The factual underpinnings of the district court's order of dismissal and judgment are not clearly erroneous and are deserving of deference upon appeal.**

The district court's findings enumerated in Section IV above have not been shown to be clearly erroneous. In bringing his Petition seeking relief Petitioner was required to present an evidentiary and factual basis upon which he might premise "in custody" jurisdiction. Petitioner failed to testify and instead chose to rely upon a declaration of Pauline Namuo as the sole basis for his "in custody" evidence. He should not now be heard to complain.

**2. The legal authorities and case law cited by the district court in its order of dismissal clearly establish that petitioner is not "in custody."**

Petitioner does not argue here on appeal that the threat of future incarceration for contempt for failure to pay his fine or to attend the alcohol abuse rehabilitation program, is a basis for the habeas corpus jurisdictional prerequisite of "custody." Petitioner did not raise this argument before the district court claiming only that the actual restraint or presence in the classroom was his basis for "custody." The district court nonetheless addressed such stating as follows:

> It is clear in this circuit, that the mere imposition of a fine, backed up by the threat of incarceration for non-payment, is not "custody" within the meaning of Section

2254. *See Dremann v. Francis*, 828 F.2d 6 (9th Circ. 1987) (no habeas relief available for attorney who was fined $500 for contempt of court and sentenced to jail for the lesser of three days or until he paid his fine).

Two other circuits have addressed the issue of drivers license suspensions, both finding that suspensions of up to one year do not amount to "custody" within the meaning of Section 2254. *See Harts v. State of Indiana*, 732 F.2d 95 (7th Circ. 1984) (one year drivers license suspension not "custody" under Sec. 2254); *Westberry v. Keith*, 434 F.2d 623, 624-25 (5th Circ. 1970) ($250 fine and one year license revocation not custody within meaning of 28 U.S.C. Sec. 2254); See also *Whorley v. Brilhart*, 359 F.Supp. 539, 541-42 (E.D. Va. 1973) (ten year license revocation not custody).

**B. APPELLATE COURTS REVIEWING DISTRICT COURT DETERMINATIONS OF "IN CUSTODY" HABEAS CORPUS JURISDICTION MUST RECOGNIZE THE EMERGING FEDERALISM WHICH ACCORDS STATE COURT JUDGEMENTS GREATER FINALITY; WHICH RECOGNIZES THE REALITY OF SCARCE JUDICIAL RESOURCES; WHICH RECOGNIZES THE REFOCUSING OF INSTITUTIONS VIS A VIS INDIVIDUALS; ALL OF WHICH MAY UNDERLIE THE DETERMINATIONS OF "CUSTODY" IN NON-INCARCERATION CASES.**

Petitioner's Opening Brief (O.B. 9-11) cites to foreign cases arising in Great Britain or under the European Court of Human Rights. Petitioner argues that his mandatory attendance at alcohol rehabilitation classes would be deemed a significant infringement of his liberty "under notions prevailing in democratic states." O.B. at 11. Respondents submit that such authorities afford this court no assistance and are basically irrelevant to our developing jurisprudence in habeas corpus.

Of greater and more important consideration are the treatises which have looked to the developing case law dealing with the "in custody" jurisdictional prerequisite for habeas corpus relief. Two such treatises track the historical development of this issue. *See* L. Yackle, Post-Conviction Remedies, Chapter 4, Custody and Related Matters at 177 (1981, Supp. 1991) (hereinafter "Yackle") and Federal Standards of Review, *supra*, Section 13.02 at p. 13-13.

The authors of both treatise generally posit that explanation of the clearly non-incarceration cases decided should be examined in historical context weighing such factors as economics and availability of judicial resources, social changes ongoing, etc. Yackle, *supra*, Section 43 at 181, 187 n. 75.

In this case, the district court's determination of "no custody" jurisdiction is consistent with the authors notions. Respondents argue that in these times a claim of absolute and totally uninhibited liberty and freedom from fourteen hours of alcohol rehabilitation training necessitates a federal case review all seems a bit of a lack of common sense, a waste and askew of reality.

## V.

## CONCLUSION

Based on the foregoing legal authority and the facts of the case, the Respondents respectfully request that the District Court Judgment dismissing the petition be affirmed.

Dated at Honolulu, Hawaii: May 8, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondents-Appellees

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\WALLACE W. WEATHERWAX
Deputy Prosecuting Attorney
City and County of Honolulu

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | NO.92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC# Civil 91-00139-HMF Hawaii (Honolulu) |
| | ) | |
| vs. | ) | |
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| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

## STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6(b) of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents, by and through their undersigned counsel,

hereby certify that respondents are unaware of any pending cases related to this case.

Dated at Honolulu, Hawaii: May 8, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondents-Appellees

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\Wallace W. Weatherwax
Deputy Prosecuting Attorney
City and County of Honolulu

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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| DWIGHT O. DOW, | ) | NO.92-15128 |
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| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served on the following by depositing the same in the United States mail, postage prepaid, on May 8, 1992, addressed as follows:

Earle A. Partington, Esq.
PARTINGTON & FOLEY
1001 Bishop Street
Pacific Tower, Suite 2450
Honolulu, Hawaii 96813

Dated at Honolulu, Hawaii: May 8, 1992.

Respectfully submitted,

STATE OF HAWAII
Respondents-Appellees

By KEITH M. KANESHIRO
Prosecuting Attorney

By \s\Wallace W. Weatherwax
Deputy Prosecuting Attorney
City and County of Honolulu

**APPENDIX "M"**

**UNITED STATES COURT OF APPEALS**

| | | |
|---|---|---|
| FOR THE NINTH CIRCUIT | | |
| DWIGHT O. DOW, | ) | NO. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC # Civil 91-00139-HMF Hawaii |
| vs. | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, | ) | |
| Respondents-Appellees. | ) | |

**PETITIONER-APPELLANT'S REPLY BRIEF**

**and**

**CERTIFICATE OF SERVICE**

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## I. ARGUMENT

### A. THE DISTRICT COURT ERRED IN HOLDING THAT DOW'S SENTENCE OF, *INTER ALIA*, A FOURTEEN HOUR ALCOHOL ABUSE REHABILITATION PROGRAM FOR HIS CONVICTION OF DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR IS NOT A SIGNIFICANT RESTRAINT ON LIBERTY SO AS TO PLACE DOW "IN CUSTODY" AS REQUIRED TO INVOKE FEDERAL HABEAS CORPUS JURISDICTION UNDER 28 U.S.C. § 2254.

In their Answering Brief, Appellees argue that the district court's factual findings are not clearly erroneous and therefore must be sustained. Appellant Dow (hereinafter "Dow") is at a loss to understand the relevance of this argument. The case was submitted to the district court on undisputed facts, and the only issue to be decided on appeal is whether Dow is "in custody" in order to invoke federal habeas corpus relief. This is purely a question of law for which the *de novo* standard of review is applicable.

The only authorities on which Appellees rely are two treatises (Ans. Br. at 7). The second treatise does not address the custody requirement at all, and the first treatise adds nothing beyond that stated in the Opening Brief. Appellees further argue that the English and European cases cited by Dow in his Opening Brief are "irrelevant to our developing jurisprudence in habeas corpus." Appellees do not attempt to justify this rather extraordinary conclusion, which runs so counter to the mandate of *Jones v. Cunningham*, 371 U.S. 236 (1963). Like so much of Anglo-American law, the applicability of

the Great Writ depends directly upon existing mores in society. The Great Writ is alive, and its vitality must of necessity be measured against similar notions prevailing in democratic states. In the end, Appellees ask this Court to affirm the district court solely on the basis that drunk driving cases are unworthy of the valuable resources of the federal courts (Ans.Br. at 8). There are two serious difficulties with this proposition. The first is that drunk driving is a "serious offense" under Hawaii law. *State v. O'Brien*, 68 Haw. 39, 704 P.2d 883 (1985); *State v. Jordan*, 72 Haw. 597, 825 P.2d 1065 (1992). Secondly, the quality of the custody is not measured bythe quality of the offense. If jail is imposed for a parking offense, no one could dispute that federal habeas corpus would lie to challenge the constitutionality of that jail sentence.

Appellees essentially retreat to their argument below that the fourteen hour alcohol abuse rehabilitation program ispecuniary in nature — that is, it is a fine. The district court rejected this argument in its order as it is obvious that there is nothing pecuniary in being required to attend this program. If one is to seek an analogy here and ignore the fact that theprogram is itself actual restraint,[1] the closest analogy would be to probation. The sentence imposed on Dow by the state trial court is essentially that he shall be on probation until he completes

---

[1] If a private party restrained Dow in order to force him to attend this program, the private party would be guilty of the felony of Unlawful Imprisonment in the First Degree in violation (H.R.S. § 707-721(1)(b).

the fourteen hour program, at which time his probation is terminated. Just as in the case of probation, if Dow fails to complete the program, he can be brought back before the court and sentenced to further punishment. And it is beyond dispute that a probationary sentence is sufficient custody to invoke federal habeas corpus jurisdiction. *E.g., United States v. Re*, 372 F.2d 641, 643 (2d Cir. 1967); *Barry v. Brower*, 864 F.2d 294, 296 (3d Cir. 1988); *Coronado v. United States Bd. of Parole*, 540 F.2d216, 217 (5th Cir. 1976); *McVeigh v. Smith*, 872 F.2d 725, 727(6th Cir. 1989); *Drollinger v. Milligan*, 552 F.2d 1220, 1224 (7thCir. 1977); *Porth v. Templar*, 453 F.2d 330, 332-33 (10th Cir.1971).

## II. CONCLUSION

The judgment below should be reversed and this case remanded to the district court for decision on the merits of Dow's petition.[2]

DATED: Honolulu, Hawaii, May 13, 1992.

\s\Earle A. Partington
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Attorney for Petitioner-Appellant

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[2] Erratum to Opening Brief: page 8, the end of the third line from the bottom of the page, the phrase "eighty-six hours time should read "eighty-four times."

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | NO. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | DC # Civil 91-00139-HMF Hawaii |
| | ) | |
| vs. | ) | |
| | ) | |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, and WARREN PRICE, III, Attorney General of Hawaii, | ) | |
| | ) | |
| Respondents-Appellees. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused two copies of Petitioner-Appellant's Reply Brief to be duly served by hand delivery upon the following:

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DATED: Honolulu, Hawaii, May 13, 1992.

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**APPENDIX "N"**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW,<br><br>Petitioner-Appellant,<br><br>vs.<br><br>CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al.,<br><br>Respondents-Appellee. | ) | C.A. No. 92-15128<br><br>D.C. No. CV-91-00139-HMF<br><br>ON APPEAL FROM THE UNITED DISTRICT COURT FOR THE DISTRICT OF HAWAII, HON. HAROLD M. FONG, CHIEF DISTRICT JUDGE |

**BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARIZONA, IDAHO, MONTANA, NEVADA AND WASHINGTON, AND THE TERRITORY OF GUAM, IN SUPPORT OF THE PETITION FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC**

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| DWIGHT O. DOW, | ) | C.A. No. 92-15128 |
| | ) | |
| Petitioner-Appellant, | ) | D.C. No. CV-91-00139-HMF |
| | ) | |
| vs. | ) | ON APPEAL FROM THE UNITED |
| | ) | DISTRICT COURT FOR THE DISTRICT |
| CIRCUIT COURT OF THE FIRST CIRCUIT, through the Honorable Wendell K. Huddy, Criminal Administrative Judge, et al., | ) | OF HAWAII, HON. HAROLD M. FONG, CHIEF DISTRICT JUDGE |
| | ) | |
| Respondents-Appellee. | ) | |
| | ) | |

**BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARIZONA, IDAHO, MONTANA, NEVADA AND WASHINGTON, AND THE TERRITORY OF GUAM, IN SUPPORT OF THE PETITION FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC**

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## INTEREST OF THE AMICI CURIAE

The amici States (and Territory), who are bound, through *stare decisis*, by the decision in this case, have a significant interest in the Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc. For the decision of the panel vastly expands the number of cases within federal habeas corpus jurisdiction and will thereby subject the amici States to the greatly increased burden and expense of defending against these attacks, not to mention the increased risk of the vacating of otherwise final convictions. The amici States will now face potentially thousands of habeas corpus attacks upon otherwise final convictions in all those cases where, although the defendant has not been sentenced to any period of incarceration or probation, the defendant is subject to some minor requirement, including, for example, attending an alcohol or drug rehabilitation class for a few hours, or undergoing a driver's education program for a couple of days. This wide-ranging and, we submit, wholly unwarranted expansion of federal habeas corpus jurisdiction will also wreak havoc upon the already overburdened federal courts.

## ARGUMENT

The petition for panel rehearing or en banc rehearing should be granted because, contrary to the panel's opinion, Dow was not "in custody" under 28 U.S.C. § 2254(a), a prerequisite to habeas corpus jurisdiction. *Maleng v. Cook*, 490 U.S. 488,490 (1989)(per curiam). The decision conflicts with existing case law both within and without this Circuit, and directly contradicts the United States Supreme Court's limitation of the habeas

corpus remedy to only those who are suffering a "significant restraint" on their liberty.

Dow was not sentenced to any incarceration or probation.The only basis for the panel's conclusion that Dow was "in custody" is the fact that he was sentenced to 14 hours of attendance at an alcohol abuse rehabilitation program. *See Dow*, slip op. at 6073-74. Such a limited and minor requirement, that otherwise allows Dow to do everything any other free person in this country is allowed to do simply can not constitute the "custody" needed to invoke the "extraordinary remedy" of habeas corpus. *Hensley v. Municipal Court*, 411 U.S. 345, (1973).

The United States Supreme Court in *Jones v. Cunningham*, 371 U.S. 236 (1963), set forth the standard that a person is in custody if the restrictions "significantly" restrain petitioner's liberty to do those things which in this country free men are entitled to do." 371 U.S. at 243 (emphasis added). The petitioner in *Jones* was held to have satisfied this "significant restraint" test because:

> Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. [A] single deviation, however slight, might be enough to result in his being returned to prison .... He can be rearrested at any time

> the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime.

*Jones*, 371 U.S. at 242. The restraints on Jones' liberty listed above were, to say the last, numerous and severe. *Cf. Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 301(1984) (custody found, in part because petitioner's release from 2-year jail sentence was conditioned upon his "not depart[ing] without leave, and in the meantime ... keep[ing]the peace and be[ing] of good behavior"); *Benson v. California*, 328 F.2d 159, 162 (9th Cir. 1964), *cert. denied* 380 U.S. 951(1965) (*Jones*-like probationary conditions are "custody"). Dow, on the other hand, is not subject to a single one of those restraints. The only limitation upon his behavior is that he attend 14 hours of an alcohol rehabilitation class. While this requirement can be viewed as a "restraint" on his liberty to some degree, it surely cannot amount to a <u>significant</u> restraint.

Dow is free to go anywhere, and to do anything all other free citizens are allowed to do, without permission from anyone. And he does not have to report to anyone, nor can he be thrown back in jail for a violation without any procedural safeguards. A refusal to attend the 14 hours of alcohol rehabilitation class could subject him to a contempt of court proceeding, but he would not be sent to jail until and unless he were convicted of criminal contempt, after a trial in accordance with Due Process.

Similarly, in *Hensley v. Municipal Court*, 411 U.S. 345(1973), the United States Supreme Court held that a defendant released on his own recognizance after convic-

tion was "in custody." In that case, the petitioner had to agree, as a condition of his release, that:

> (a) He will appear at all times and places as ordered by the court or magistrate releasing him . . . . (c) Any court or magistrate of competent jurisdiction may revoke the order of release and . . . return him to custody . . . . [Cal. Penal Code § 1318.4].

*Hensley*, 411 U.S. at 348. The Court properly found these conditions to be "severe restraints" because his "freedom of movement rests in the hands of state Judicial officers, who may demand his presence at any time and without a moment's notice."411 U.S. at 351.[1] Dow, on the other hand, is merely required to attend 14 hours of alcohol rehabilitation class, period. He is not subject to the possibility of being summoned at "a moment's notice" nor can any state judicial officer "demand his presence at any time." Nor is Dow subject to having his release revoked and being returned to jail, for the very obvious reason that he was never sentenced to jail in the first place and thus never released from anything. In *Hensley*, on the other hand, petitioner had been sentenced to jail and "remain[ed] at large only by the grace of a stay entered [by the courts]." 411 U.S. at 351. Hensley had "been forced to fend off the state authorities by means of a stay . . . [and the] need to keep the stay in force [was] itself an

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[1] *Cf. Justices of Boston Municipal Court*, 466 U.S. at 301(custody found, in part because petitioner was required to appear for trial not only at scheduled day, but for the entire trial "until the final sentence").

unusual and substantial impairment of his liberty." 411 U.S. at 352. Dow, of course, does not have to take steps to keep a stay in force, as there is no jail time to stay Dow must only comply with the requirement of attending 14 hours of class. If he does not comply, he cannot automatically be sent to jail at the discretion of some state officer or judge, but would have to first be tried and convicted of contempt of court, a wholly separate offense from his DUI conviction. *Compare Justices of Boston Municipal Court*, 466 U.S. at 301(custody found, in part because original 2-year Jail term could be imposed for non-compliance "without a further trial").

It must be emphasized that the mere fact that Dow could,after a contempt of court conviction for refusing to attend the class, face jail time cannot be sufficient to satisfy the "in custody" jurisdictional prerequisite, for otherwise any sentence requiring physically voluntary acts, no matter how minimally intrusive upon liberty those acts might be, would be subject to habeas attack. For example, a sentence imposing a fine also subjects the convict to jail time upon contempt of court for refusing to pay the fine, yet it is undisputed that sentences imposing only fines do not satisfy the "in custody" requirement. *See, e.g., Dremann v. Francis*, 828 F.2d 6, 7 (9thCir. 1987); *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9thCir.), *cert. denied*, 423 U.S. 825 (1975).

As *Hensley* and this court in Dremann emphasized, where the petitioner has little or no control over whether he will ultimately be incarcerated, he will likely be deemed to be "in custody," *Hensley*, 411 U.S. at 351-52; *Dremann*, 828 F.2d at 7, but where he "truly holds the keys to the jailhouse door," Dremann, 828 F.2d at 7 (quoting *Spring v. Caldwell*, 692 F.2d994, 998 (5th Cir. 1982)), he will not be deemed to be "in custody."

*Dremann*, 828 F.2d at 7. In *Dremann*, this Court held that petitioner "held the keys" because he "faces in carceration only if he refuses to pay the fine." *Id.* Similarly, Dow holds the keys because he faces possible jail time (following a conviction for contempt of court) only if he refuses to attend the alcohol rehabilitation class. Dow has complete control over whether or not he ever goes to jail. The *Hensley* petitioner, on the contrary, could have ended up incarceratedno matter what he did, if a court chose to lift the stay and/or "revoke the order of release and . . . return him to custody" pursuant to Cal. Penal Code § 1318.4.

Finally, the Court in *Hensley* also relied upon the fact that rejecting habeas corpus at that time would only result in the postponement of the habeas action until petitioner had begun to serve his one-year jail sentence. Here, on the contrary, rejecting habeas would most likely lead to the termination, forever, of this case (not counting, of course, a grant of certiorari). As this Court in *Dremann* reasoned:

> Dremann has not alleged that he is indigent or otherwise unable to pay the fine. Therefore, Dremann's incarceration is far from 'imminent,' but rather is still highly speculative . . . .

*Dremann*, 828 F.2d at 7. Thus, "dismissing [petitioner's]action . . . [does] not necessarily 'result in mere postponement of the habeas hearing' because there would be no incarceration if [petitioner] pays the fine." *Id.; see also Edmunds*, 509 F.2d at 41 & n.3. Similarly, Dow has not alleged that he is incapable of attending the alcohol rehabilitation classes, and thus, if habeas is rejected now, it is likely that he will attend the class, and thus never be incarcerated (for contempt of court). Dow

will consequently never end up "in custody," and no habeas jurisdiction will ever exist. No mere "postponement" is involved here.

The panel in this case justifies its decision by stating:

> The sentence in this case, requiring appellant's physical presence at a particular place, significantly restrains appellant's liberty to do those things which free persons in the United States are entitled to do and therefore must be characterized, for Jurisdictional purposes, as "custody." Appellant "cannot come and go as he pleases." *Hensley*, 411 U.S. at 351. Moreover, appellant suffers a greater restraint upon his liberty — mandatory class attendance — than the restraint suffered by a person who is released upon his own recognizance. See *id.* at 351-53 (holding that person released on recognizance is "in custody").

*Dow*, slip op. at 6074. It is true that the 14-hour class attendance requirement does require Dow's "presence at a particular place" at some certain times. But the panel's conclusion that such a restriction significantly restrains appellant's liberty does not follow. After all, he must only be at the alcohol rehabilitation class for 14 hours out of his entire life. And while 14 hours in a jail or prison cell would be a significant restraint on liberty, given the harsh and severely restrictive nature of jail and prison life, 14 hours in a classroom, in a non-punitive setting, learning positive civic behavior and ways to control one's drinking and driving problem, can hardly be comparable.

As noted earlier, outside of attending those 14

hours of class, Dow is permitted to do everything else any other free person in this country is allowed to do, without any restrictions whatsoever. Thus, the panel's statement that Dow" cannot come and go as he pleases" is hardly controlling, for it is the degree to which one cannot "come and go as one pleases" and the degree to which one's liberty "to do those things which free persons in the United States are entitled to do" is restricted that matters. The panel simply read the"significant" out of the Supreme Court's "significant restraint" test.[2]

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. [H]abeas corpus ... has been limited to cases

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[2] That any (as opposed to a significant) restriction on one's ability to "come and go as one pleases" is not sufficient to invoke habeas jurisdiction is made clear not only by the by the numerous cases holding that license suspensions do not entitle one to bring a habeas corpus attack, *see, e.g, Westberrv v. Keith*, 434F.2d 623, 624-25 (5th Cir. 1970) (driver's license), *Lillios v. State of New Hampshire*, 788 F.2d 60, 61 (1st Cir. 1986 (driver's license); *Harts v. Indiana*, 732 F.2d 95 (7th Cir.1984) (driver's license); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (law license, real estate license, insurance agent license), even though it is clear that such license suspensions do, to some degree, deprive persons of the ability to "come and go as one pleases" or "to do those things which free persons in the United States are entitled to do". For example, driver's license suspensions plainly impede a person's ability to travel by oneself, and go where ever one wants to at any time. Without a driver's license, one is forced to find others who are willing to drive that person, or to catch buses, trains, or airplanes, and be limited by their routes and time schedules, not to mention fares. And deprivation of professional licenses also restrain a person's liberty to earn a living engaged in that person's chosen profession, even though all other persons who qualify are free to do so.

> of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

*Hensley,* 411 U.S. at 351 (emphasis added).

The panel's statement that Dow suffers even greater restraint than the *Hensley* petitioner released on his own recognizance did is just flat wrong. As discussed earlier, in *Hensley*, the petitioner was subject to having his presence demanded at any time and without a moment's notice, and could be returned to custody by the order of any court or magistrate at any time. *Hensley*, 411 U.S. at 348, 351. Dow does not live under any such constraints. It must be remembered that, unlike Dow, Hensley had already been sentenced to one year in jail. *Cf. Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (One "must be incarcerated, or under imminent threat of incarceration, in order to meet the custody requirement"); *Edmunds*, 509 F.2d at 41 (confinement must be "imminent"). Only a stay held off incarceration. Indeed, Hensley's need to constantly fight to maintain the stay was itself deemed to be a substantial impairment of liberty. 411 U.S. at 352. Dow, of course, is under no threat of imminent incarceration.

## CONCLUSION

As the above discussion of controlling federal case law amply demonstrates, requiring a person to attend a mere 14 hours of alcohol rehabilitation class simply does not constitute a "significant restraint" on liberty sufficient to satisfy the "in custody" prerequisite to habeas corpus jurisdiction. The panel's decision to the contrary creates not only intra-circuit and inter-circuit conflict, but

directly contradicts the United States Supreme Court's mandate reserving the "extraordinary" remedy of habeas corpus for only "severe restraints on individual liberty." *Hensley*, 411 U.S. at 351. Panel or en banc rehearing and reversal is required.

DATED: Honolulu, Hawaii, June 23, 1993.

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